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Fifth report on the expulsions of aliens

By Mr. Maurice Kamto, Special Rapporteur

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Introduction

1. In his fourth report,[1] the Special Rapporteur considered the issue of expulsion in cases of dual or multiple nationality and that of loss of nationality or denationalization. While his analysis of these issues gave rise to heated discussion by the Commission, most of its members shared the Special Rapporteur's conclusion that it would not be worthwhile for the Commission to set out draft rules specific to these issues, even in the interest of progressive development of international law,[2] since the topic deals not with the nationality regime but with the expulsion of aliens.

2. It should also be recalled that the working group established in 2008, at the sixtieth session of the Commission, in order to consider the issues raised by the expulsion of persons having dual or multiple nationality and by denationalization in relation to expulsion concluded that (a) "the commentary to the draft articles should indicate that, for the purposes of the draft articles, the principle of the non-expulsion of nationals applies also to persons who have legally acquired one or several other nationalities" and that (b) the commentary should include "wording to make it clear that States should not use denationalization as a means of circumventing their obligations under the principle of the non-expulsion of nationals". These conclusions were approved by the Commission, which requested the Drafting Committee to take them into consideration in its work.[3]

3. States' representatives took a variety of positions on the topic in general, and on the questions addressed in the fourth report in particular, during the Sixth Committee's consideration, at the sixty-third session of the United Nations General Assembly, of the report of the International Law Commission on the work of its sixtieth session. Ultimately, however, it is clear from the discussion that most of the delegations that spoke on this topic share the Special Rapporteur's view that the International Law Commission would be unwise to undertake the preparation of draft articles on the issues of dual or multiple nationality, loss of nationality and denationalization in the context of expulsion.[4]

4. With regard to general comments on the topic, its scope of application, the definitions proposed by the Special Rapporteur and the right of expulsion and its limitations, a few States, even at this stage, expressed doubts as to whether the topic of the expulsion of aliens lent itself to codification and progressive development.[5] Other States said that there appeared to be no need for codification in certain areas,

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[1] A/CN.4/594, 24 March 2008.

[2] Ibid., para. 35.

[3] See *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 171.

[4] See, in particular, the statements made by the representatives of Canada (A/C.6/63/SR.20, para. 34), France (A/C.6/63/SR.19, para. 17), Greece (A/C.6/63/SR.24, para. 5), the Islamic Republic of Iran (A/C.6/63/SR.24, para. 39), Israel (A/C.6/63/SR.24, para. 77), Italy (A/C.6/63/SR.19, para. 98), New Zealand (A/C.6/63/SR.22, para. 9), the Netherlands (A/C.6/63/SR.20, para. 16), Qatar (A/C.6/63/SR.21, para. 57) and the United Kingdom (A/C.6/63/SR.21, para. 25).

[5] See the statements made by the representatives of Japan (A/C.6/63/SR.22, para. 18) and the United Kingdom (A/C.6/63/SR.21, para. 25).

such as that of migrant workers,[6] while still others stated, concerning the scope of the topic, that questions relating to non-admission, extradition and other forms of movement of persons,[7] to expulsion in situations of armed conflict[8] or to the status of refugees, non-refoulement and movement of populations[9] should be excluded. With regard to definitions, some States considered that the term "territory" was vague[10] or that there was no need for a separate definition of the term "conduct".[11] Another delegation proposed that the Commission should make it clear that the term "refugee" should be defined in accordance with each country's obligations in that regard.[12] Several States stressed the need to strike a balance between the sovereign right of States to expel aliens and the limits imposed by international law, particularly the rules relating to the protection of human rights and the treatment of aliens;[13] in that spirit, some States made it clear that the right of expulsion implied, conversely, the obligation of States to readmit their own nationals.[14] In addition, one State noted that expulsion should be based on legitimate grounds such as public safety and national security, as defined in the domestic law,[15] while another maintained that it should be possible to expel aliens not lawfully present for that reason alone.[16]

5. Clearly, these comments and observations by States concern issues that have already been hotly debated by the Commission. These debates have allowed the Special Rapporteur to provide the necessary clarification and explanations and have allowed the Commission to develop a general approach to the topic, to which it can make any necessary modifications as the process continues. For this reason, the Special Rapporteur will not dwell further on the matter, particularly as most of the concerns were taken duly into account in the second report.

6. With regard, more specifically, to comments made on the issues of expulsion in cases of dual or multiple nationality and denationalization followed by expulsion,

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[6] See the statement made by the representative of Denmark on behalf of the Nordic countries (A/C.6/63/SR.20, para. 2).

[7] See the statement made by the representative of the United States of America (A/C.6/63/SR.21, para. 9).

[8] See the statements made by the representative of the United States of America (A/C.6/63/SR.21, para. 9) and Israel (A/C.6/63/SR.24, para. 76).

[9] See the statement made by the representative of Israel (A/C.6/63/SR.24, para. 76).

[10] See the statements made by the representatives of the United States of America (A/C.6/63/SR.21, para. 12) and Israel (A/C.6/63/SR.24, para. 76).

[11] See the statement made by the representative of Israel (A/C.6/63/SR.24, para. 76).

[12] See the statement made by the representative of the United States of America (A/C.6/63/SR.21, para. 14). Surprisingly, the same country suggested that the language of draft article 5, on refugees, should more consistently track the provisions of the 28 July 1951 Convention relating to the Status of Refugees (arts. 32 and 33) and should take the distinction between legal and illegal refugees into account (ibid.).

[13] See the statements made by the representative of Denmark on behalf of the Nordic countries (A/C.6/63/SR.20, para. 3), Japan (A/C.6/63/SR.22, para. 18), New Zealand (A/C.6/63/SR.22, para. 9), El Salvador (A/C.6/63/SR.23, para. 48) and the Islamic Republic of Iran (A/C.6/63/SR.24, para. 73).

[14] See the statement made by the representative of Denmark on behalf of the Nordic countries (A/C.6/63/SR.20, para. 3).

[15] See the statement made by the representative of the Islamic Republic of Iran (A/C.6/63/SR.24, para. 37).

[16] See the statement made by the representative of the United States of America (A/C.6/63/SR.21, para. 10).

which were the subject of my fourth report, various concerns have been expressed in connection with different aspects of the Special Rapporteur's analysis. One State expressed doubts as to the appropriateness of including a draft article on non-expulsion of nationals.[17] However, several other States stressed that the expulsion of nationals was prohibited by international law[18] since the principle of non-expulsion of nationals was a basic human right recognized under customary international law.[19] However, while some States consider that this is an absolute principle,[20] others believe that it may be subject to certain derogations under exceptional circumstances[21] but that any exception to the principle must be carefully drafted and narrowly construed.[22] Several States endorsed the Commission's position that the principle of non-expulsion of nationals applies also to persons who have legally acquired more than one nationality.[23] One of those States suggested that this should be explicitly reflected in draft article 4[24] and others proposed that the matter should be clarified in the commentary.[25] Similarly, it was noted that the criterion of "effective" or "dominant" nationality could not justify a State's treating its nationals as aliens for the purposes of expulsion.[26] However, one State supported the opposite point of view, maintaining that the principle of non-expulsion of nationals did not typically apply to persons with dual or multiple nationality and that it was necessary to clarify what was meant by "effective" nationality.[27]

7. Concerning the possible relationship between, on the one hand, loss of nationality and denationalization, and, on the other, expulsion, some States reaffirmed the right of every person to a nationality and the right not to be arbitrarily deprived of one's nationality.[28] One State considered that denationalization was prohibited by

[17] See the statement made by the representative of the United Kingdom (A/C.6/63/SR.21, para. 25).

[18] See, in particular, the statements made by the representatives of the Czech Republic (A/C.6/63/SR.19, para. 93), Hungary (A/C.6/63/SR.20, para. 30), the Islamic Republic of Iran (A/C.6/63/SR.24, para. 37) and Israel (A/C.6/63/SR.24, para. 76).

[19] See the statement made by the representative of Hungary (A/C.6/63/SR.20, para. 30).

[20] See the statements made by the representatives of the Republic of Korea (A/C.6/63/SR.19, para. 65), the Czech Republic (A/C.6/63/SR. 19, para. 93), Portugal (A/C.6/63/SR.20, para. 26), the Islamic Republic of Iran (statement) and El Salvador (A/C.6/63/SR.23, para. 49).

[21] See the statements made by the representatives of Romania (A/C.6/63/SR.21, para. 57) and Qatar (A/C.6/63/SR.24, para. 77).

[22] See the statement made by the representative of Greece (A/C.6/63/SR.24, para. 4).

[23] See the statements made by the representatives of France (A/C.6/63/SR.19, para. 17), the Czech Republic (A/C.6/63/SR.19, para. 93), the Netherlands (A/C.6/63/SR.20, para. 13), Portugal (A/C.6/63/SR.20, para. 26), Hungary (A/C.6/63/SR.20, para. 30), the United States of America (A/C.6/63/SR.21, para. 13), Poland (A/C.6/63/SR.21, para. 33), the Russian Federation (A/C.6/63/SR.21, para. 43), Chile (A/C.6/63/SR.22, para. 17), India (A/C.6/63/SR.23, para. 23), El Salvador (A/C.6/63/SR.23, paras. 48 and 49), Greece (A/C.6/63/SR.24, para. 4) and the Islamic Republic of Iran (A/C.6/63/SR.24, para. 38).

[24] See the statement made by the representative of the Netherlands (A/C.6/63/SR.20, para. 16).

[25] See the statements made by the representatives of France (A/C.6/63/SR.19, para. 17) and Chile (A/C.6/63/SR.22, para. 17).

[26] See the statements made by the representatives of the Czech Republic (A/C.6/63/SR.19, para. 93), the Netherlands (A/C.6/63/SR.20, para. 14), Portugal (A/C.6/63/SR.20, para. 26), Greece (A/C.6/63/SR.24, para. 4) and the Islamic Republic of Iran (A/C.6/63/SR.24, para. 38).

[27] See the statement made by the representative of Cuba (A/C.6/63/SR.24, para. 27).

[28] See the statement made by the representatives of Portugal (A/C.6/63/SR.20, para. 26) and Romania (A/C.6/63/SR.21, para. 57).

international law,[29] while others felt that denationalization was permissible under certain circumstances[30] — on condition, said some, that it did not lead to statelessness,[31] that it was done in accordance with domestic law[32] and that it was non-discriminatory,[33] and on the understanding that it must not be done arbitrarily or unlawfully.[34] On this point, a number of States agreed with the International Law Commission's conclusion that States should not use denationalization as a means of circumventing the principle of non-expulsion of nationals,[35] and the inclusion of a draft article to that effect was proposed.[36]

8. Bearing all this in mind, it is now time to pursue the study of the rules that limit the right of expulsion, which was begun in the third report.[37] As stated in that report, the right to expel must be exercised with respect for the *rules of international law*[38] that limit it. The third report examined the limits relating to the person to be expelled and identified, in turn, the principles of non-expulsion of nationals, non-expulsion of refugees, non-expulsion of stateless persons and prohibition of collective expulsion.

9. The present report will pursue this study by considering, on the one hand, the limits relating to the obligation to respect the human rights of persons being expelled and, on the other, some practices that are prohibited by international law on expulsion.

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[29] See the statement made by the representative of the Islamic Republic of Iran (A/C.6/63/SR.24, para. 37).

[30] See the statements made by the representatives of the Netherlands (A/C.6/63/SR.20, para. 15) and Israel (A/C.6/63/SR.24, para. 76).

[31] See the statements made by the representatives of the Netherlands (A/C.6/63/SR.20, para. 15), Greece (statement) and Cuba (A/C.6/63/SR.24, para. 27).

[32] See the statement made by the representative of Greece (statement).

[33] Ibid.

[34] See the statements made by the representatives of Greece (statement) and Israel (A/C.6/63/SR.24, para. 76).

[35] See the statements made by the representatives of Portugal (A/C.6/63/SR.20, para. 26), the United States of America (A/C.6/63/SR.21, para. 13), Poland (A/C.6/63/SR.21, para. 33), the Russian Federation (A/C.6/63/SR.21, para. 43), Chile (A/C.6/63/SR.22, para. 11), India (A/C.6/63/SR.23, para. 23) and El Salvador (A/C.6/63/SR.23, para. 48).

[36] See the statement made by the representative of Italy (A/C.6/63/SR.19, para. 98).

[37] A/CN.4/581.

[38] In his previous reports, the Special Rapporteur spoke of the "fundamental rules of international law". In light of the merits of the comments made both within and outside the Commission, he decided to delete the word "fundamental", which restricts the scope of the relevant rules of international law and which, moreover, is likely to give rise to controversy as to which rules of international law are, or are not, considered fundamental.

Part One
General Rules

III. General principles

B. A right to be exercised subject to respect for the rules of international law (continuation of A/CN.4/581 — section title revised)

2. Limits relating to the requirement of respect for fundamental human rights

(a) Preliminary considerations

(i) Protection of the rights of all human beings

10. Persons being expelled, for whatever reason, remain human beings who, as such, must continue to enjoy all their fundamental rights. Such persons have the same attributes and aspire to the same freedoms, regardless of their race, ethnicity, sex, beliefs or nationality; this is what has been called the universal identity of human beings.[39] A tendency to place humankind at the centre of international ethics has made the protection of these fundamental rights a major concern of contemporary international law. As we know, this protection is no longer left to the discretion of States, a practice justified by the domestic jurisdiction doctrine on the dubious grounds of absolute State sovereignty. Persons whom a State has decided to expel must be protected, particularly as such persons are made vulnerable by their status as aliens and by the prospect of their expulsion. They are guaranteed this protection under international law and under the law of the expelling State, regardless of their legal status and of the conditions under which they entered the territory of that State, whether as legal or illegal aliens; nationals are not concerned owing to the principle that a State may not expel its own nationals.

11. This equal protection of all people is the cornerstone of all human rights regimes. It derives from both the universal human rights instruments and the regional legal instruments. For example, the Universal Declaration of Human Rights (1948)[40] proclaims in the first paragraph of its preamble that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". More specifically, article 2 of this founding document states, in language that merits quotation in extenso:

> "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."

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[39] Pierre-Marie Dupuy, *Droit international public*, 7th ed. (Paris, Dalloz, 2004), p. 208.

[40] The texts of the legal instruments cited in this report are published in *Human Rights: A Compilation of International Instruments*, Volumes I and II (First Part) (New York and Geneva, 2002).

12. In the same spirit, the High Contracting Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, hereinafter the "European Convention on Human Rights", in article 1 thereof — significantly entitled "Obligation to respect human rights" — undertook to "secure to everyone within their jurisdiction the rights and freedoms defined in ... this Convention". This provision not only recalls the general obligation of respect for human rights; it internalizes that obligation by guaranteeing enjoyment of the rights and freedoms set forth in the Convention to anyone within the jurisdiction of the High Contracting Parties.[41] In a similar vein, article 1 of the 1969 American Convention on Human Rights (Pact of San José, Costa Rica), "Obligation to Respect Rights", provides as follows: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition". In articles 1 and 2, the African Charter on Human and Peoples' Rights states, in different words, that: "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status" and that the States members of the Organization of African Unity, who are automatically parties to the Charter, "shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them". The protection of rights and freedoms is extremely broad and comprehensive, and States' obligation is both specific and extensive.

13. From these legal instruments, a principle of non-discrimination among the beneficiaries of the rights and freedoms set forth therein emerges; this principle is expressed differently according to whether the instrument is universal or regional in nature. The universal instruments concern all human beings, wherever they may be and whatever their origin. In the regional instruments, the reference to persons "subject to the jurisdiction" of the State, particularly in the European Convention, appears to limit the number of beneficiaries of the rights and freedoms set forth in the Convention since the principle of universality is maintained *ratione personae* rather than *ratione loci*; everyone, regardless of legal status or condition, has the benefit of the rights and freedoms set forth in these regional instruments.

14. Thus, the status of national confers no more rights than that of alien. By the same token, alien status does not create a situation of inferiority with regard to the protection required by human rights; in fact, even unlawful residence in the territory of a State cannot justify a lessening of these fundamental rights, even during expulsion proceedings. In its judgement in *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*,[42] the European Court of Human Rights recalled that in exercising their sovereign right to control their borders and the entry and stay of aliens, States must comply with their international obligations, including those established in the European Convention on Human Rights (arts. 3, 5 and 8) and the Convention on the

[41] See Juan Antonio Carrillo Salcedo, commentary on article 1, in Louis-Edmond Pettiti, Emmanuel Decaux and Pierre-Henri Imbert (eds.), *La Convention européenne des droits de l'homme: Commentaire article par article*, 2nd ed. (Paris, Economica, 1999), p. 135.

[42] European Court of Human Rights, application No. 13178/03, Judgement of 12 October 2006.

Rights of the Child of 20 November 1989 (arts. 3, 10 and 37) — in other words, they must respect the fundamental rights of aliens and, in particular, those of children. According to the Court, "the States' interest in foiling attempts to circumvent immigration rules must not deprive aliens of the protection afforded by these conventions or deprive foreign minors, especially if unaccompanied, of the protection their status warrants".[43]

15. Protection of the rights of aliens has been of special concern to the United Nations General Assembly since the 1970s. A Sub-Commission was established to consider the matter; it concluded its work in 1977.[44] On the basis of the outcome of this work, the General Assembly adopted the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live.[45] The Declaration covers all the individuals in question and calls for respect for the human rights of aliens, specifically the right to life; the right to privacy; the right to be equal before courts and tribunals; the right to freedom of opinion and religion; and the right to retain their own language, culture and tradition.[46] The Declaration also prohibits individual or collective expulsion on discriminatory grounds[47] and establishes the right to join trade unions and the right to safe and healthy working conditions, the right to medical care, the right to social security and the right to education.[48] However, the Declaration remains quite general with regard to the scope of the rights protected. Thus, closer study is needed in order to try to identify, through international human rights instruments and the judicial practices of universal and regional monitoring bodies and national courts, the specific human rights rules that must particularly be respected during expulsions.

(ii) Concept of "fundamental rights"

16. The question is whether aliens being expelled are entitled to enjoy all human rights, or whether the specific nature of their status requires that only their fundamental rights be guaranteed in this instance.

17. The Special Rapporteur considers it unrealistic to require that a person being expelled be able to benefit from all the human rights guaranteed by international instruments and by the domestic law of the expelling State. For example, how would it be possible to guarantee, throughout the expulsion process, the exercise of their right to education, to freedom of assembly and association and to free enterprise; their freedom to choose a profession; and their right to work, to marry and to found a family? It seems more realistic and more consistent with State practice to limit the rights guaranteed during expulsion to the *fundamental* human rights.

18. While this concept of fundamental rights has its basis in legal language, its meaning is remarkably confused by the use of other concepts that are considered to

[43] European Court of Human Rights, Judgement of 12 October 2006, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, para. 81.

[44] See Baroness Elles, *The Problem of the Applicability of Existing International Provisions for the Protection of Human Rights to Individuals Who Are Not Citizens of the Country in Which They Live* (E/CN.4/Sub.2/392).

[45] Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, General Assembly resolution 40/144 of 13 December 1985.

[46] Ibid., art. 5.

[47] Ibid., art. 7.

[48] Ibid., art. 8.

be related or equivalent. For example, the legal literature includes examples of a failure to distinguish between the concepts of human rights, civil liberties, fundamental freedoms, fundamental rights and freedoms and fundamental principles, and it is not clear that they refer to the same legal reality.[49]

19. The concept of fundamental rights corresponds to several domestic law models. First, some rights are considered fundamental owing to their place in the hierarchy of law; constitutionally protected rights and freedoms fall into this category.[50] It has even been argued that fundamental rights are essentially constitutional[51] and that this distinguishes them from the broader category of civil liberties. The fundamental rights would thus be those that are expressed or guaranteed by the higher laws of a given legal system or that are essential to the existence and content of other such rights.[52]

20. Both of these models draw upon the legal system for elements of a definition of "fundamental rights"; they are therefore subject to the vagaries of the legal edifice and to the arbitrariness of lawmakers. The question of the contingency of fundamental rights lies at the heart of a major controversy. According to some authors, these rights are superior to legal systems because they represent higher values.[53] This position recalls the idea of natural law, which is continually laid to rest and then resurrected.[54] Opposing this model are those who believe that the existence of supra-constitutional rules of domestic law is a virtually ontological or absolute impossibility,[55] especially since their existence would deprive the people of their (lawmaking) sovereignty. The French Constitutional Council shares this view[56] although, on close examination, its words suggest[57] that by repeating the language of the Constitution, the Council, perhaps unconsciously, was merely taking note of (pre)-existing rules rather than drawing attention to the rules established by the regulatory authorities. It is thus understandable that the Constitutional Court of Germany should take the view that the substance of fundamental rights lies beyond

[49] See Jean-Marie Tchakoua, *Dignité et droits fondamentaux des salariés: Réflexion à partir des droits camerounais et français*, University of Yaoundé II Law School dissertation, 1999, p. 5.

[50] See Louis Favoreu, "Rapport introductif", delivered at a conference on the protection of fundamental rights by European constitutional courts (19-21 February 1981), *Revue internationale de droit constitutionnel*, 1981, p. 671.

[51] See Bruno Genevois, "Norme de valeur constitutionnelle et degré de protection des droits fondamentaux", *Revue française de droit administratif*, 1990, p. 317.

[52] Laurent Marcoux, "Le concept de droits fondamentaux dans le droit de la Communauté Economique Européenne", *Revue internationale de droit constitutionnel*, 1984, p. 69.

[53] See, in particular, Jean-Pierre Laborde's concluding remarks at the fourth session of the Journées franco-espagnoles de droit comparé du travail (12-14 May 1994) on the topic: "Les principes et droits fondamentaux en matière sociale en Espagne et en France", *Bulletin de Droit Comparé du Travail et de la Sécurité Sociale*, 1994, No. 2, pp. 119-120.

[54] See Pierre Kayser, "Essai de contribution au droit naturel à l'approche du troisième millénaire", *Revue de la Recherche Juridique*, 1998, No. 2, p. 287.

[55] See Bertrand Mathieu, "La supra-constitutionnalité existe-t-elle? Réflexions sur un mythe et quelques réalités", *Les Petites Affiches*, 1995, No. 29, p. 12.

[56] See, for example, its Decision No. 92-312 DC of 2 September 1992, *Recueil*, p. 94.

[57] The 1958 French Constitution, like those of several other countries, uses the verbs "recognize" and "proclaim" in setting forth fundamental rights. These two verbs do not convey the idea of (normative) creation; according to the usual French-language dictionaries (*Le Petit Robert*, *Larousse*), "to proclaim" means "to announce or recognize by an official instrument" and "recognize" means "to acknowledge as true or real", "to take note of, to reveal".

the scope of any constituent power, even the drafters of a new constitution.[58] This position is comparable to the one expressed in a judgement of the Constitutional Court of Italy, which specifically stated:

> "The Italian Constitution includes several supreme principles which cannot be overturned or modified in their essential content, even through a constitutional review act or other constitutional legislation".[59]

21. This debate — which is, moreover, a classic one — between the supporters of legal positivism and the defenders of natural law is not unrelated to international human rights law, but the discussion has been less heated in this area; as we shall see, despite some reluctance, the idea that a category of inviolable human rights exists ultimately prevailed.

22. The fundamental-rights-based approach is not without problems; the question is to determine what is meant by "fundamental rights". The terminology is well established in legal theory, which has endorsed it without always being able to find a precise definition of the concept.[60] Similarly, the word "fundamental" is included in the titles of a few international human rights instruments, such as the aforementioned European Convention for the Protection of Human Rights and Fundamental Freedoms and the 11 protocols thereto; the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms[61] and the Basic Principles for the Treatment of Prisoners.[62]

23. The concept of the "fundamental rights" of human beings vaguely recalls the theory of the fundamental rights of States, which appeared in the eighteenth-century legal theory of Emmerich de Vattel.[63] The concept of the fundamental rights of States, which is a direct offshoot of de Vattel's theory of the perfect rights and

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[58] See the Court's decision of 23 April 1991.

[59] Judgement cited by Louis Favoreux and Loïc Philip, *Les grandes décisions du Conseil constitutionnel*, 9th ed. (Paris, Dalloz, 1997), p. 826.

[60] The search engine Google finds several thousand hits for "droits fondamentaux" (fundamental rights). See, for example, the quarterly online journal *Droits fondamentaux* (www.droits-fondamentaux.org), No. 1 (July-December 2001). An editorial in this volume by Professor Emmanuel Decaux uses the term only once, stating that today, as in the past, the fundamental rights remain a challenge. But he explains neither the meaning of this concept nor his choice, stating only that "the universal and indivisible rights proclaimed by the Charter of the United Nations in 1945 deserve more than lip service"; only this sentence vaguely suggests his position on the matter; Rémy Cabrillac, Marie-Anne Frison-Roche, Thierry Revet and Christophe Albiges, *Libertés et droits fondamentaux*, 14th ed. (Paris, Dalloz, 2008); Jean-Marie Pontier, *Droits fondamentaux et libertés publiques*, 3rd ed. (Paris, Hachette Supérieur, 2007); Mireille Delmas-Marty and Claude Lucas de Leyssac (eds.), *Libertés et droits fondamentaux*, 2nd ed. (Paris, Seuil, 2002); Gérard Couturier, Mireille Delmas-Marty and Claude Lucas de Leyssac (eds.), *Libertés et droits fondamentaux* (Paris, Seuil, 1996); and Jacques Fialaire and Eric Mondielli, *Droits fondamentaux et libertés publiques* (Paris, Ellipses, 2005); see also, inter alia, Jean-Yves Carlier, "Et Geneva sera ... La définition du réfugié: Bilan et perspectives", in *La convention de Genève du 28 juillet 1951 relative au statut des réfugiés 50 ans après: Bilan et perspectives* (Brussels, Bruylant, 2001), which mentions the contextualization of fundamental rights (p. 79).

[61] Adopted by the General Assembly by its resolution 53/144 of 9 December 1998.

[62] Adopted and proclaimed by the General Assembly by its resolution 45/111 of 14 December 1990.

[63] See Emmerich de Vattel, *Le Droit des gens ou Principes de la loi naturelle appliqués à la conduite et aux affaires des Nations et des Souverains*, 1758.

obligations of States, was systematized in the nineteenth century by authors such as Latin American diplomat Carlos Calvo,[64] French university professor Antoine Pillet[65] and British judge Robert Philimore.[66] This theory is based on the idea that States, by the mere fact of their existence, have inherent, permanent and fundamental rights in their relations with other States. It is imperative for all States to respect these rights, which are thus at the root of the law of nations and of all international relations, both in peacetime and in wartime; similarly, violation of these rights justifies the use of force. The content of these fundamental rights of States varies from one author to another, but most of them refer to what was known at that time as the right to self-preservation: the right to respect for sovereignty, to trade and to equality. The earliest legal theorists considered that these fundamental rights of States arose from natural law. For that reason, this theory was abandoned under the deep and lasting influence of positivism on international legal theory.[67]

24. This theory cannot be transferred mechanically to the field of human rights, but it is clear that the two situations share the dominant idea of a set of rights that are essential to the very existence of both the State and the individual. Moreover, it was the Charter of the United Nations that officially introduced the concept of the "fundamental rights" of persons by proclaiming, in its Preamble, that "the peoples of the United Nations ... reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women (...)".[68] Such a statement is also found in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights; article 5, paragraph 2, of the former instrument states that "there shall be no restriction upon or derogation from any of the *fundamental human rights* recognized or existing in any State Party to the present Covenant (...)".[69] Moreover, the Charter of the United Nations states that one of the purposes of the United Nations is "to achieve international co-operation" in, inter alia, "encouraging respect for human rights and for *fundamental freedoms* for all without distinction as to race, sex, language, or religion".[70] The words "human rights and fundamental freedoms" also appear in Article 55 (*c*) of the Charter.[71]

25. Clearly, the vocabulary is somewhat inconsistent. The reference is either to "fundamental rights" or to "human rights and fundamental freedoms"; "fundamental" modifies "freedoms", which shows that rights are not at issue here. The expression "fundamental rights" is not used in Article 1, paragraph 3, or Article 55 (*c*), of the Charter. While the authors of commentaries on the Preamble to the

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[64] See Carlos Calvo, *Le droit international théorique et pratique*, 1870.

[65] See Antoine Pillet, "Recherches sur les droits fondamentaux des états dans l'ordre des rapports internationaux ...", *Revue Générale de Droit International Public*, 1898.

[66] See Robert Philimore, *Commentaries upon International Law*, 1854-1861.

[67] For a recent summary of this theory, see Denis Alland (ed.), *Droit international public* (Paris, Presses universitaires de France ("Droit fondamental" collection), 2000), pp. 78-79.

[68] Preamble to the Charter.

[69] Emphasis added.

[70] Article 1, paragraph 3, of the Charter. Emphasis added.

[71] Without claiming to be exhaustive, we might also mention paragraph 15 of the Vienna Declaration and Programme of Action, adopted in Vienna on 25 June 1993 at the World Conference on Human Rights.

Charter take note of this fact, they do not discuss it or draw any conclusions.[72] However, the two expressions cannot be said to be synonymous. Is this shift from "fundamental human rights" to "human rights and fundamental freedoms" a sign that the framers of the Charter wished to limit the scope of the fundamental norms in question to those that touched on freedoms?

26. There is nothing to support such a conclusion. The truth is that no international instrument provides a definition of the concept of "fundamental rights", or even that of "fundamental freedoms", which appears — as we have seen — in the wording of several international conventions. We might have hoped for clarification from the Commission or the European Court of Human Rights, at least with regard to the "fundamental freedoms" mentioned in the 1950 Convention. The Commission and the Court have indeed referred explicitly or implicitly to the fifth paragraph of the preamble to this Convention as a reflection of one of its essential characteristics, the attempt to strike "a just balance between the protection of the general interest of the Community and the respect due to fundamental human rights while attaching particular importance to the latter".[73] While specifically entitled the "Charter of Fundamental Rights of the European Union",[74] the instrument adopted on 7 December 2000 at the Nice Summit by the European Parliament, the Council of the European Union and the European Commission provides no assistance in defining the concept of "fundamental rights"; neither its preamble nor its articles have anything to offer in that regard. We might conclude from this that all the rights set forth in the 54 articles of the European Charter are the "fundamental rights" to which it refers. The title of the instrument supports this theory, but was that really the intention of its drafters?

27. The judgement handed down by the European Court of Human Rights in *Golder* followed a logic that might be helpful in determining the meaning of the concept of "fundamental rights". In that case, the Court did not ignore the British Government's comment that the drafters of the European Convention on Human Rights had taken a "selective approach" and that the Convention did not seek to protect human rights in general, but merely "certain of the Rights stated in the Universal Declaration".[75] This leads to the following conclusion: just as each international human rights instrument targets a particular aspect of human rights (such as the rights of the child, the rights of women, the rights of migrant workers or slavery) or targets only certain rights and freedoms, it will easily be agreed that all human rights cannot be exercised simultaneously at all times. The range of fundamental rights may vary according to the status and current situation of individuals; however, these variations must occur around what is held to be a "hard core" regarded as inviolable. Rarely have jurists addressed this issue squarely.

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[72] See the commentary by Jean-Pierre Cot and Alain Pellet in Jean-Pierre Cot, Alain Pellet and Matias Forteau (eds.), *La Charte des Nations Unies: commentaire, article par article*, 3rd ed. (Paris, Economica 2005), p. 290.

[73] *Case "relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" (merits)*, Judgement of 23 July 1968, Series A, No. 6, para. 5; see also the judgement of 7 July 1989 in *Soering v. United Kingdom*, Series A, No. 161, para. 87; and Theo van Boven, "Convention de sauvegarde des droits et libertés fondamentales: commentaire du préambule", in Pettiti, Decaux and Imbert (note 41 above), p. 130.

[74] See the *Official Journal of the European Communities*, 18 December 2000 (2000/C 364/01).

[75] Judgement of 21 February 1975, Series A, No. 18, para. 34.

(iii) Fundamental rights and the "inviolable" or "non-derogable core" of human rights

a. Definition

28. There is no legal definition of the concept of "fundamental human rights". Legal theorists sometimes appear to confuse it with the concept of "human rights"[76] and therefore conclude that it refers to all the rights and freedoms of the individual that are recognized in States' constitutions and in international instruments and are protected by the relevant national and international bodies. In the context of this and subsequent reports, the term "fundamental rights" will be understood as synonymous with the "hard core" of human rights.

29. In legal theory, establishing a hierarchy of human rights makes it easier to ensure respect for the core rights that the international community considers fundamental. This concept of a "hard core" is used in both international human rights law and international humanitarian law to refer to "a set of human rights from which there can be no derogation. The list of these rights varies from one convention to another, but they all include a few rights that are the minimum needed to protect physical safety and integrity. These are also referred to as 'inviolable rights'; we therefore speak of an 'inviolable core'".[77] In the same vein, another writer states that "some rules have been accorded particular authority and customary recognition; they form the 'hard core' of human rights. These include the so-called 'inviolable rights' from which no derogation is permitted, even in wartime".[78] Still another writer concludes that "there is, in any event, a hard core of human rights that ensure respect for individuals' dignity and physical integrity and that are binding everywhere and on every authority. In reality, this is a guarantor of the values that are the basis for universal civilization, for what the Statute of the International Criminal Court (Rome, 17 July 1998) calls 'a shared heritage [and a] delicate mosaic [that] may be shattered at any time'".[79]

30. The idea of a hard core of non-derogable rights is not, however, above criticism. The classic objection is that it would amount to establishing a hierarchy among human rights, thereby violating the principle of their indivisibility. But some consider that the concept has a "subjective, evolving and even contingent nature that is in clear contradiction to universality",[80] while others believe that it endorses a

[76] For example, when we speak of the online journal *Droits fondamentaux* or of the research network *Droits fondmentaux*, we mean nothing less than the entire body of human rights, without exception. The same is true of the many studies of "fundamental rights and freedoms", several of which are mentioned in note 60 above.

[77] Alain Le Guyader, "La question philosophique d'un noyau dur des droits de l'homme", in Denis Maugenest and Paul-Gérard Pougoué (eds.), *Les droits de l'homme en Afrique centrale* (Paris, Karthala, 1995), p. 249. However, the philosopher takes exception to this definition, which he describes as "narrowly legal", and his philosophical reflections make a valuable contribution to the discussion of this concept. It goes without saying that the Special Rapporteur will focus on the legal definition.

[78] Gérard Cohen-Jonathan, "Les droits de l'homme, une valeur internationalisée", *Droits fondamentaux*, No. 1 (July-December 2001), p. 159 (www.droits-fondamentaux.org).

[79] Mohamed Bennouna, lecture given at the Sorbonne at a (French) National Consultative Commission on Human Rights conference held on the occasion of the fiftieth anniversary of the Universal Declaration of Human Rights: *Déclaration universelle des droits de l'homme, 1948-98: avenir d'un idéal commun* (Paris: La documentation française, 1999), p. 245.

[80] Dupuy, *Droit international public* (note 39 above), p. 225.

reality of relations between States and thus that it "simply expresses a positivist prejudice".[81]

31. This criticism seems ideological rather than legal or technical in nature. It is based on the principles of the universality and indivisibility of human rights, which convey the dubious idea that all rights are equally important and have equal legal status. As has rightly been noted, the idea of a hard core is "a response to the individualist proliferation of rights, which may pose a threat to the idea of human rights".[82]

32. Contrary to initial assumption, this idea makes it easier to address the use of cultural relativism to justify derogations from, and even violations of, universal human rights standards and challenges to the universal concept of human rights. In this context, the universal appears as the hard core.[83] The crucial problem here is to find an operative identification criterion so that this hard core can be defined. On this point, Professor Frédéric Sudre has provided useful clarification; he writes that "the term 'hard core' necessarily implies a 'soft envelope' and a distinction between rights that are fundamental and rights that are less so, between priority rights and secondary rights, between first-tier and second-tier rights. In short, the hypothesis of a 'hard core' raises the inescapable question, in law, of the hierarchy of human rights".[84]

33. Many critics consider such an approach shocking and, in any event, blasphemous because it is contrary to the founding principles of the indivisibility and interdependence of human rights.[85]

34. The idea of the possible existence of a hard core of human rights is not, however, groundless from the legal point of view. Beyond the philosophical language and the ideological and essentially moral approach to the issue, it is clear that "human rights law does not protect all rights in the same manner". If *lex ferenda* is not confused with *lex lata*, as it often is by some militant human rights activists, it will be seen that human rights law "does not place all proclaimed rights within the same legal regime and that it is possible to agree on the principle of cumulative, complementary application of proclaimed rights".[86]

35. If we may consider that there is general agreement regarding the legal and practical usefulness of the hard core, what identification criteria should be used?

36. The concept of *jus cogens* cannot be a satisfactory criterion.[87] On the one hand, despite its acceptance in treaties and case law, it remains controversial because of the indeterminacy of its content. On the other hand, with regard to human rights, it is the subject of contrary interpretations: a broad interpretation

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[81] Le Guyader, "La question philosophique d'un noyau dur des droits de l'homme" (note 77 above), p. 254.

[82] Ibid., p. 255.

[83] Ibid., p. 266.

[84] Frédéric Sudre, "Quel noyau intangible des droits de l'homme?", in Maugenest and Pougoué (eds.), *Les droits de l'homme en Afrique centrale* (Paris, Karthala, 1995) (note 77 above), p. 271.

[85] See, for example, Patrice Meyer-Bisch, "Le problème des limitations du noyau intangible des droits de l'homme", in Patrice Meyer-Bisch (ed.), *Le noyau intangible des droits de l'homme* (Fribourg, Editions universitaires, 1991), p. 101.

[86] Sudre (note 84 above), p. 271.

[87] Ibid., p. 272; by the same author, *Droit international et européen des droits de l'homme*, 2nd ed. (Paris, Presses universitaires de France, 1995), Nos. 42-44.

under which human rights in general form part of *jus cogens*, as suggested by the Commission's articles on the responsibility of States for internationally wrongful acts and its Code of Crimes against the Peace and Security of Mankind; and a restrictive interpretation under which only a few human rights form part of it. Sudre notes that an examination of international human rights instruments, with the sole exception of the African Charter on Human and Peoples' Rights, reveals a "duality of the legal regime for human rights": certain rights, which Sudre calls "*conditional rights*",[88] "may be subject to restrictions and/or derogation and may therefore be imperfectly applied and/or temporarily not applied, while other rights — *inviolable rights* — are not subject to these restrictions; they are absolute rights applicable to everyone at all times and in all places".[89]

37. The operative criterion for identifying the hard core of human rights is therefore the *inviolability* of the rights concerned. It cannot be denied that this concept of a "hard" or "inviolable" core introduces a hierarchy of human rights. However, it is clearly a de facto hierarchy deriving from the analysis of international legal instruments rather than from a formal rule: a hard core of inviolable rights enjoying absolute protection derives from the major human rights instruments, such as the European Convention on Human Rights (art. 15), the American Convention on Human Rights (art. 27, para. 2) and the International Covenant on Civil and Political Rights (art. 4, para. 2). The African Charter is the only exception.

38. It is indeed the "universal" rights which underlie this concept of a "hard core" of human rights: "the question of the 'hard core' presupposes the existence of a common irreducible base on which there would be general agreement, but which would implicitly allow for diverse interpretations of human rights (...)".[90] And from the point of view of human rights implementation, the concept of a hard core is the practical result of the fact that the constantly evolving list of human rights is ignored by many States or regarded as a mere petitio principii and that therefore an essential minimum should be "guaranteed, a sort of standard below which it is not possible to speak of 'human rights'".[91]

b. Content

39. The issue here is to determine, within the corpus of human rights, which rights constitute the hard core. The content of this hard core may not be identified in exactly the same way from one author to another.

40. In general, it is considered that the fundamental rights forming the "hard core" of human rights comprise the right to life and the prohibition of torture, inhuman treatment or punishment, slavery and servitude. Some authors add to these the principles of equality and non-retroactivity of the law. However, the content is likely to vary with regard to time and even space. In this regard, Protocol No. 7 to the European Convention on Human Rights, adopted on 22 November 1984, adds a new right to the list of inviolable rights contained in the 1950 Convention: the principle *non bis in idem* (art. 4). Similarly, it has been noted that the list of rights forming the "hard core" differs from one continent to another. While the African Charter on

[88] F. Sudre, *Droit international et européen des droits de l'homme*, 2nd ed. (Paris, Presses universitaires de France, 1995), No. 120.

[89] F. Sudre, "Quel noyau intangible des droits de l'homme?" (note 84 above), p. 272.

[90] Ibid., p. 267.

[91] Ibid.

Human and Peoples' Rights contains no non-derogable rights, there are five such rights in Europe, 11 in the Americas and seven at the universal level.[92]

41. Cohen-Jonathan proposes an even more extensive list. He believes that a comparison of article 4, paragraph 2, of the International Covenant on Civil and Political Rights and article 15, paragraph 2, of the European Convention on Human Rights indicates that the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, and the prohibition of slavery constitute "inviolable" rights; this corresponds approximately to the content of common article 3 of the four Geneva Conventions.[93] However, he adds that, in accordance with international case law, prohibition of the flagrant denial of justice and of arbitrary detention should be added to these. Moreover, he considers that the prohibition of racial discrimination and discrimination against women, already mentioned specifically in Article 55 (*c*) of the Charter of the United Nations, should be included in this list, not to mention freedom of thought, conscience and religion, which is considered an equally inviolable right under article 4 of the International Covenant on Civil and Political Rights.[94]

42. In this context, the question of the universality of the "hard core" arises. An analysis shows that a number of these rights constitute a common irreducible base in all lists of "hard core" rights. This "hard core of the hard cores", to quote Sudre, consists of four rights: the right to life, the right not to be subjected to torture or to inhuman or degrading treatment, the right not to be held in slavery or servitude, and the right to the non-retroactivity of criminal law.[95]

43. To these may be added, as fundamental rights associated with the specific situation of a person being expelled: the principle of non-discrimination; the right to respect for the physical integrity of the person being expelled; the right to respect for family life; and the right of a person not to be expelled to a country where his or her life is in danger.

44. The protection afforded by respect for these rights should bring about the implementation of the overarching human right, which is the right to dignity.

(b) General obligation to respect human rights

45. There is agreement today on the existence of a general international obligation to respect human rights.[96] This is an obligation *erga omnes*, according to the judgment of the International Court of Justice in its famous dictum in the *Barcelona Traction* case. The Court stated:

> "In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the

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[92] F. Sudre, "Quel noyau intangible des droits de l'homme?" (note 84 above), p. 274.

[93] See Cohen-Jonathan, "Les droits de l'homme, une valeur internationalisée" (note 78 above), p. 159.

[94] Ibid., p. 160.

[95] Ibid.; Meyer-Bisch, ed., *Le noyau intangible des droits de l'homme* (note 85 above); Dupuy, *Droit international public* (note 39 above), p. 226.

[96] See Flauss, in Alland, ed., *Droit international public* (note 67 above), pp. 577-593; Cohen-Jonathan, "Les droits de l'homme, une valeur internationalisée" (note 78 above), pp. 160-161.

importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23); others are conferred by international instruments of a universal or quasi-universal character".[97]

46. In the same vein, the Court noted, in its judgment of 27 June 1986 in *Military and Paramilitary Activities in and against Nicaragua*, that "the absence of ... a commitment [with regard to human rights] would not mean that [a State] could with impunity violate human rights".[98]

47. Reproducing the wording used by the Court in *Barcelona Traction*, the Institute of International Law, in its resolution of 13 September 1989,[99] stated with regard to the general international obligation to respect human rights that "it is incumbent upon every State in relation to the international community as a whole, and every State has a legal interest in the protection of human rights".

48. The draft articles on the responsibility of States for internationally wrongful acts, as adopted by the Commission on first reading in 1996, set out very clearly this concept of obligations *erga omnes* with regard to norms for "the protection of human rights and fundamental freedoms", and the possibility of the public right of action that this concept implies. Draft article 40[100] stated that "injured State" meant, " ... (e) if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that: ... (iii) the right has been created or is established for the protection of human rights and fundamental freedoms". In the final version of the draft articles, adopted by the Commission on second reading in 2001, and of which the General Assembly "took note" in its resolution 56/83 of 12 December 2001, fundamentally the same approach seems to have been taken, even though the expression "injured State" is no longer used in relation to such cases, and despite the fact that the articles no longer contain, in this context, an explicit reference to human rights and fundamental freedoms. Pursuant to the 2001 version of article 48, paragraph 1, "any State other than an injured State" is entitled to invoke the responsibility of another State in accordance with paragraph 2 of the article if "(a) the obligation breached is owed to a group of States including that State, and is established for the protection

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[97] Judgment of 5 February 1970, *I.C.J. Reports 1970*, p. 32, paras. 33 and 34.

[98] *I.C.J. Reports 1986*, para. 267.

[99] Session of Santiago de Compostela; see, on this aspect of the Institute's work, Gérard Cohen-Jonathan, "La responsabilité pour atteinte aux droits de l'homme", in *La responsabilité dans le système international*, Colloque de la Société française pour le droit international (Paris, Pedone, 1991), p. 120.

[100] See the report of the International Law Commission on the work of its forty-eighth session (6 May-26 July 1996), document A/51/10, in *Yearbook of the International Law Commission 1996*, vol. II (Part Two), pp. 62-63.

of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole". And in this regard, it should be noted that the commentary to paragraph 1 (a) of the article mentions as an example the case of "a regional system for the protection of human rights",[101] while the commentary to paragraph 1 (b) refers in particular to the part of the judgment of the International Court of Justice in *Barcelona Traction* which cites as examples of obligations *erga omnes* "the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination".[102]

49. It may be inferred from the above provisions that the breach by a State of its obligations relating to human rights protection may entail the responsibility of that State vis-à-vis all the other States parties to the treaty in question in the case of a treaty obligation, or vis-à-vis all States where the obligation breached is governed by general international law and is owed to the international community as a whole.

50. This general international obligation to respect human rights is all the more imperative with regard to persons whose legal situation makes them vulnerable, as is the case with regard to aliens being expelled. For this reason, on the strength of the elements of international case law mentioned above and the degree of agreement on the subject in the legal literature, which is widely supported by the work of authoritative codification bodies, the following draft article is proposed:

Draft article 8: General obligation to respect the human rights of persons being expelled

Any person who has been or is being expelled is entitled to respect for his or her fundamental rights and all other rights the implementation of which is required by his or her specific circumstances.

(c) Specially protected rights of persons being expelled

51. As a human being, an alien present in the territory of a State enjoys the protection of his or her human rights. As an alien being expelled, he or she enjoys, in addition to this general protection, specific protection of some of these rights. As the Institute of International Law had already proposed in the late nineteenth century in article 17 of its Geneva resolution of 9 September 1892 on the International Rules on the Admission and Expulsion of Aliens, "expulsion is not a punishment and must therefore be executed with the utmost consideration and taking into account the individual's particular situation".[103]

52. Special protection of the rights in question of the person being expelled is afforded through the "hard core" rights — the inviolable rights of the expelled person that derive from international legal instruments and are reinforced by international case law. These are:

- The right to life;
- The right to dignity;
- The right to the integrity of the person;

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[101] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 320, para. 7 of the commentary.

[102] Ibid., p. 322, para. 9 of the commentary.

[103] *Annuaire de l'Institut de droit international*, 1894, second part, p. 222.

– Non-discrimination;

– The right not to be subjected to torture or to inhuman or degrading treatment or punishment;

– The right to family life.

(i) The right to life

53. The right to life, which, under article 6, paragraph 1, of the International Covenant on Civil and Political Rights, is "inherent" to "every human being", is enshrined, albeit in a variety of wordings, in the main international human rights instruments, both universal[104] and regional.[105]

54. What is the substance of this right? The Universal Declaration of Human Rights (1948) gives no indication; article 3 merely affirms laconically that "everyone has the right to life, liberty and security of person". The American Declaration of the Rights and Duties of Man (1948) merely reproduces this wording in extenso in article 1.

55. It was the European Convention on Human Rights that first set out detailed provisions regarding the right to life which tell us about the substance of that right. Article 2 of the Convention states:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> a. in defence of any person from unlawful violence;
>
> b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> c. in action lawfully taken for the purpose of quelling a riot or insurrection".

56. It can be seen that this interpretation of the right to life does not rule out the death penalty as a possible punishment for certain criminal offences imposed by a court in accordance with the law. This approach is followed in the International Covenant on Civil and Political Rights, through the wording of the third sentence of article 6, paragraph 1, which states: "No one shall be arbitrarily deprived of his life." This means, in non-negative wording, that a person may be deprived of his or her life provided that this is not done in an arbitrary manner. This wording from the Covenant is reproduced to the letter in article 4 of the American Convention on

[104] See in particular article 3 of the Universal Declaration of Human Rights (1948) and article 6 of the International Covenant on Civil and Political Rights.

[105] See article 2 of the European Convention on Human Rights (1950); article 2 of the Charter of Fundamental Rights of the European Union; article 4 of the American Convention on Human Rights (1969); article 1 of the American Declaration of the Rights and Duties of Man (1948); and article 4 of the African Charter on Human and Peoples' Rights (1981).

Human Rights (1969) and article 4 of the African Charter on Human and Peoples' Rights (1981).

57. It was the Second Optional Protocol of 1989 to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, that radically changed the scope of the rule affirming the right to life, by providing in article 1 that:

> "1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.
>
> "2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction."

Similarly, article 1 of Protocol No. 6 of 28 April 1983 to the European Convention on Human Rights provides: "The death penalty shall be abolished. No one shall be condemned to such penalty or executed". The structure of article 2 of the Charter of Fundamental Rights of the European Union demonstrates that the prohibition of the death penalty and of execution is understood as the corollary of the right to life. Thus, after the statement in article 2, paragraph 1, that "everyone has the right to life", paragraph 2 of the article provides that "no one shall be condemned to the death penalty, or executed". Therefore, pursuant to this Charter, the right to life entails the prohibition of capital punishment and of execution.

58. However, this prohibition is still constrained by conflicting legislation in many countries outside Europe and is by no means a universal customary rule, despite the moratorium on the use of the death penalty adopted by the General Assembly by its resolution 62/149 of 18 December 2007.[106] It is true that the United Nations Commission on Human Rights had, during the 10 years preceding the resolution in question, adopted resolutions at all its sessions calling upon "States that still maintain the death penalty to abolish [it] completely and, in the meantime, to establish a moratorium on executions".[107] However, this resolution, like that of the General Assembly itself, is merely a set of recommendations that are not legally binding and do not represent an *opinio juris communis* on the subject: resolution 62/149 was not adopted unanimously.

59. With regard to case law, the question of expulsion, extradition or refoulement of a person to a State where his or her right to life may be violated has been considered both at the international level and at the regional level.

[106] See resolution 62/149 of 18 December 2007, in which the Assembly "calls upon all States that still maintain the death penalty", inter alia, "(c) to progressively restrict the use of the death penalty and reduce the number of offences for which it may be imposed; (d) to establish a moratorium on executions with a view to abolishing the death penalty" (para. 2). In addition, the Assembly "calls upon States which have abolished the death penalty not to reintroduce it" (para. 3).

[107] The Commission's last resolution before the adoption of the General Assembly resolution of 18 December 2007 was that of 20 April 2005 (resolution 2005/59).

60. At the international level, the United Nations Human Rights Committee considered the question in a well-known case, *Ng v. Canada* (1993),[108] which, although it relates to an issue of extradition rather than expulsion, may nonetheless illuminate the point under discussion. Mr. Ng was a detainee who had committed a series of murders. He was totally without scruples and was considered particularly dangerous. The United States of America had requested Canada to extradite Mr. Ng because of the murders he had committed on United States soil. The problem was therefore that of extradition to a State where the author would be subject to the death penalty. Knowing that the International Covenant on Civil and Political Rights permitted the death penalty (or in any case did not prohibit it), Canada extradited Mr. Ng to the United States. Although it had not violated article 6 of the Covenant, Canada was nonetheless held to have violated its obligations under article 7 because, in this case, it was possible that the execution would be carried out by means of gas asphyxiation, which causes pain and prolonged agony and does not result in death as swiftly as possible. It was therefore the risk of cruel treatment that was condemned in this case.

61. However, in 2003, the Human Rights Committee in *R. Judge v. Canada* overturned its jurisprudence in this matter. The case concerned a man sentenced to death in the United States for murder, who then escaped to Canada. He contested his extradition to the United States, citing the risk he ran in the United States of being executed. The Committee reversed its earlier jurisprudence and came up with a new interpretation of article 6, paragraph 1, of the Covenant in which, after a lengthy argument, it concluded:

> "For these reasons, the Committee considers that Canada, as a State party which has abolished the death penalty, irrespective of whether it has ratified the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, violated the author's right to life under article 6, paragraph 1, by deporting him to the United States, where he is under sentence of death, without ensuring that the death penalty would not be carried out. The Committee recognizes that Canada did not itself impose the death penalty on the author. But by deporting him to a country where he was under sentence of death, Canada established the crucial link in the causal chain that would make possible the execution of the author."[109]

62. It follows from this decision that:

(i) A State that abolishes the death penalty may not extradite or expel, or in a general sense hand over, a person sentenced to death in a State which has the death penalty without having previously obtained a guarantee that the death penalty will not be imposed or carried out;

(ii) States that have not yet abolished the death penalty and that continue to impose it in accordance with the provisions of article 6, paragraph 2, of the

[108] Communication No. 469/1991, A/49/40, annex IX, sect. CC; commentary in *Revue universelle des droits de l'homme*, 1994, p. 150. See also *Kindler v. Canada* (1993), communication No. 470/1991, A/48/40, annex XII, sect. U, and *Revue universelle des droits de l'homme*, 1994, p. 165; *Cox v. Canada* (1995), communication No. 539/1993, A/50/40, annex X, sect. M, and *Revue universelle des droits de l'homme*, 1995, p. 13.

[109] Communication No. 829/1998, decision of 5 August 2003, A/58/40, annex VI, sect. G, para. 10.6.

International Covenant on Civil and Political Rights are not subject to this obligation, which applies only to abolitionist States.

63. With regard to the jurisprudence of regional human rights bodies, the European Court of Human Rights first considered this question in the well-known case of *Soering v. United Kingdom*.[110] The applicant, who had committed a murder, contested his extradition to the United States, where he was liable to the death penalty. He argued that his extradition would violate article 3 of the European Convention on Human Rights, in view, in particular, of the conditions he would face during a long period on death row before his execution. The question was thus not the possibility of execution in the event of extradition — the death penalty as such not being prohibited by the Convention — but the circumstances attending the death penalty in the United States. This nuance led the Court to consider the question of whether there would be a real risk of torture or of inhuman or degrading treatment, and thus a violation of article 3, in the event that the applicant was extradited. Thus, the Court did not base its decision on the death penalty but on the conditions attending its imposition.

64. Several petitions have recently been lodged with the Inter-American Commission on Human Rights against States members of the Organization of American States concerning either violations of the American Convention on Human Rights (Pact of San José) or violations of the American Declaration of the Rights and Duties of Man, of 1948. Thus, in *Hugo Armendáriz v. United States*,[111] the applicant argued that his deportation from the United States to Mexico violated several provisions of the Declaration, article 1 of which protects the right to life. In *Marino López et al. (Operation Genesis) v. Colombia*,[112] the applicants cited, inter alia, a violation of article 4, paragraph 1, of the American Convention enshrining the same right. The Commission found the petitions admissible, without, however, considering the merits.

65. On the other hand, the Inter-American Court of Human Rights ruled on the obligation to protect the lives and integrity of persons subjected to expulsion in *Haitians and Dominicans of Haitian origin in the Dominican Republic*. In its order of 2 February 2006 in this case, the Court, in view of its order of 18 August 2000 requiring the Dominican Republic to take whatever measures were necessary "to protect the lives and personal integrity" of Benito Tide-Méndez, Antonio Sension, Andrea Alezy, Janty Fils-Aime and William Medina-Ferreras, and also of Father Pedro Ruquoy and Ms. Solange Pierre, its order of 12 November 2000 ratifying the order of 14 September 2000 by which the President of the Court required the same country to adopt "the necessary measures to protect the life and personal integrity" of Rafaelito Pérez Charles and Berson Gelim; and its order of 26 May 2001 recalling the two previous orders,[113] decided:

> "1. To ratify the Order of the President of the Inter-American Court of Human Rights of October 5, 2005, wherein the State was instructed to extend and implement whatever measures are necessary to protect the life and

[110] Application No. 14038/88, Judgement of 7 July 1989.

[111] Report No. 57/06, Petition 526-03, Admissibility, 20 July 2006, *Annual Report of the Inter-American Commission on Human Rights*, 563, OEA/Ser.L/V/II.127 doc. 4, para. 2.

[112] Report No. 86/06, Petition 499-04, Admissibility, 21 October 2006, *Annual Report of the Inter-American Commission on Human Rights*, 273, OEA/Ser.L/V/II.127 doc. 4, para. 2.

[113] Order of 2 February 2006, paras. 1, 2 and 3.

personal integrity of Ms. Solain Pie or Solain Pierre or Solange Pierre's four children.

"2. To reiterate what was expressed in the Orders of the Inter-American Court of Human Rights of August 18, 2000, November 12, 2000 and May 26, 2001, in the sense that the State must maintain whatever measures it may have adopted and immediately provide for those that prove necessary to effectively protect the life and personal integrity of Messrs. Benito Tide-Méndez, Antonio Sension, Janty Fils-Aime, William Medina-Ferreras, Rafaelito Pérez-Charles, Berson Gelim, Father Pedro Ruquoy and Mss. Andrea Alezy and Solain Pie or Solain Pierre or Solange Pierre.

"3. To call upon the State to create due conditions for Solain Pie or Solain Pierre or Solange Pierre and her four children to return to their home in the Dominican Republic and, as soon as this happens, to adopt whatever measures are necessary to protect their lives and personal integrity.

"[...]"[114]

66. The following conclusions may be drawn from the foregoing analyses:

(a) Firstly, the right to life of every human being is an inherent right, formally enshrined in international human rights law. As such, it applies to persons in a vulnerable situation such as aliens who are the subject of extradition, expulsion or refoulement. In this regard, it may be understood as an obligation on the part of the expelling State to protect the lives of the persons in question, both in the host country and the State of destination. Such is the tenor of article 22, paragraph 8, of the American Convention on Human Rights, which imposes significant restrictions on expulsion and places an obligation on the expelling State to protect the right to life of the alien. The article provides:

"In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinions". Article 33, paragraph 1, of the Convention relating to the Status of Refugees contains the same provision;

(b) Secondly, the right to life does not necessarily imply the prohibition of the death penalty and of executions. It is certainly the case in terms of treaty law and regional jurisprudence in Europe that any extradition (or expulsion) to a State where the person concerned may suffer the death penalty is in and of itself prohibited. But it would not be appropriate to generalize the rule, since it is not a customary norm;

(c) Thirdly, a State that has abolished the death penalty may not extradite or expel to another country a person sentenced to death without having previously obtained guarantees that the death penalty will not be carried out in this instance; however, this obligation applies only to States that have abolished the death penalty.

67. The following draft article is proposed:

[114] Ibid., decision (excerpt).

Draft article 9: Obligation to protect the right to life of persons being expelled

1. The expelling State shall protect the right to life of a person being expelled.

2. A State that has abolished the death penalty may not expel a person who has been sentenced to death to a State in which that person may be executed without having previously obtained a guarantee that the death penalty will not be carried out.

(ii) The right to dignity

68. The concept of dignity has been the subject of great interest in recent juridical writings.[115] In domestic law in particular, there is no doctrinal consensus as to whether the question should be the subject of legislation: some authors have pointed out the danger, even impossibility, of incorporating it in a juridical concept;[116] others have concluded that dignity has acquired juridical status and that this constitutes the basis for a new right.[117] There is, however, no doubt that dignity is a concept of positive law in many national legal systems.[118]

69. At the international level, the concepts of human dignity and fundamental rights have emerged and developed concomitantly. In this process dignity is both a justification and a framework principle within which other rights are forged. As the ethical and philosophical foundation of fundamental rights, the principle of respect for human dignity provides the basis for all other individual rights. The Charter of

[115] See, in particular, Bertrand Mathieu, "La dignité de la personne humaine, quel droit? quel titulaire?", Dalloz, *chronique*, 1996, pp. 282 et seq.; Saint-James, "Réflexions sur la dignité humaine en tant que concept juridique du droit français", Dalloz, *chronique*, 1997, pp. 61 ff.; B. Edelman, "La dignité de la personne humaine, un concept nouveau", Dalloz, *chronique*, 1997, pp. 185 ff.; L. Richer, "Les droits fondamentaux: une nouvelle catégorie juridique?", *Actualité juridique du droit administratif*, 1988, special edition, pp. 1 ff.; Champeil-Desplats, "La notion de 'droit fondamental' et le droit constitutionnel français", Dalloz, *chronique*, 1995, pp. 323 ff.; M.-L. Pavia, "Eléments de réflexion sur la notion de droit fondamental", *Les Petites Affiches*, 1994, No. 54, pp. 6 et seq.; Laurent Marcoux, "Le concept de droits fondamentaux dans le droit des Communautés européennes", in *Cours constitutionnelles européennes et droits fondamentaux* (Paris, Economica, 1992); also Tchakoua Dissertation (note 49 above), pp. 11 ff.

[116] See, in particular, J.-P. Theron, "Propos sur une jurisprudence contestable", in *Pouvoir et liberté. Etudes offertes à Jacques Mourgeon* (Brussels, Bruylant, 1988), pp. 295 ff.; Anne-Marie Le Pourhiet, "Le Conseil constitutionnel et l'éthique bio-médicale", in *Etudes en l'honneur de Georges Dupuis* (Paris, LGDJ, 1997), pp. 213 ff.; Claire Neirinck, "La dignité humaine ou le mauvais usage d'une notion philosophique", in P. Pedrot (ed.), *Ethique, droit et dignité de la personne* (Paris, Economica, 1999).

[117] See, in particular, Edelman, "La dignité de la personne humaine un concept nouveau", and Mathieu, "La dignité de la personne humaine, quel droit? quel titulaire?" (note 115 above).

[118] There are increasingly common references to dignity in both legal instruments and judicial decisions. With regard to instruments, see, for example in the case of France, the Criminal Code, chapter V, title III of which is entitled "Violations of dignity", the Code of Medical Ethics and the law on bio-ethics in the Civil Code; in the case of Cameroon, the preamble to the Constitution incorporating the international human rights instruments to which Cameroon is party (see, in this regard, the African Charter on Human and Peoples' Rights, art. 5). With regard to court decisions, see the decisions of the French Constitutional Council of 27 July 1994 and 25 January 1995 (*Recueil*, 1994 and 1995), of the French Council of State of 25 October 1995 (*Recueil*, 1995) and of the Paris Court of Appeal of 28 May 1996 (Dalloz, *Jurisprudence*, 1996, pp. 617 ff., note, B. Edelman). On the emergence of dignity as a new right and its impact on the French legal system, see Tchakoua, Dissertation (note 49 above), pp. 12-26.

the United Nations, in its second preambular paragraph, contains the earliest reference to these two concepts, affirming the determination of the "peoples of the United Nations (...) to reaffirm [their] faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women ...". Following on from the Charter, the Universal Declaration of Human Rights (1948) states, in its very first preambular paragraph, "*Whereas* recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".

70. It may be observed that, notwithstanding the force with which it has been enunciated, the reference to human dignity had previously remained at a preambular level, although there is no need here to join the debate on the value of the preamble to a legal instrument.[119] The concept is formulated more robustly in the operative part of the African Charter on Human and Peoples' Rights, article 5 of which provides that: "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status". More recently, the Charter of Fundamental Rights of the European Union, adopted in 2000, begins with this concept. Article 1, entitled "Human dignity", states that "Human dignity is inviolable. It must be respected and protected".

71. International jurisprudence has reinforced the positive quality of the concept of human dignity in international human rights law and, in addition, provided some elements of its content. The decision rendered by the Trial Chamber of the International Tribunal for the Former Yugoslavia in *Furundzija* is particularly interesting in this regard. The Chamber

> "holds that the forced penetration of the mouth by the male sexual organ constitutes *a most humiliating and degrading attack upon human dignity*. The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very raison d'être of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person. It is consonant with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as rape".[120]

72. A fundamental precept in human axiology is that dignity is priceless; it conveys the concept of the absolute inviolability of fundamental rights, or the "hard core" of human rights. It is thus, in addition to the right to life, which is a basic right, a fundamental right of every human being. This right is of particular

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[119] On this issue, see, in particular, Cot and Pellet, commentary on the Preamble in Jean-Pierre Cot, Alain Pellet and Mathias Forteau, *La Charte des Nations Unies. Commentaire article par article*, 3rd ed. (Paris, Economica, 2005), pp. 287-312; Théo van Boven, "Convention de sauvegarde des droits de l'homme et des libertés fondamentales. Préambule", in Pettiti, Decaux and Imbert (note 41 above), pp. 125-134.

[120] International Tribunal for the Former Yugoslavia, *Prosecutor v. Furundzija* (case No. IT-95-17/1-T), Trial Chamber, Judgement, 10 December 1998.

importance to persons being expelled owing to the risk of abuse to which aliens, especially those whose status in the expelling State is illegal, are exposed. This is why there is a need to reformulate this right in terms that are specific to the situation of an alien being expelled. The draft article below is based on article 1 of the Charter of Fundamental Rights of the European Union, the first clause of which is reproduced in extenso in paragraph 1 and the second is reflected in paragraph 2, supplemented to strengthen protection for a person who has been or is being expelled.

Draft article 10. Obligation to respect the dignity of persons being expelled

1. Human dignity is inviolable.

2. The human dignity of a person being expelled, whether that person's status in the expelling State is legal or illegal, must be respected and protected in all circumstances.

(iii) Prohibition of torture and of cruel, inhuman or degrading treatment or punishment

73. This prohibition is reflected in a wide range of treaty instruments. Thus, article 5 of the Universal Declaration of Human Rights provides that: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". This provision is echoed in article 3 of the European Convention on Human Rights,[121] in the first sentence of article 5, paragraph 2, of the American Convention on Human Rights, and in the first sentence of article 7 of the International Covenant on Civil and Political Rights. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment incorporates this same provision in its fourth preambular paragraph, by which States parties declare that they have regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights. The African Charter on Human and Peoples' Rights enshrines the same rule, but in a formulation associating it with other categories of prohibited violations of human dignity. The second sentence of article 5 provides that "[a]ll forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited".[122]

74. This general wording does not allow the precise content of the rule to be determined. International jurisprudence provides valuable assistance in this regard. In particular, the jurisprudence of the European Court of Human Rights in this area is extensive and well established.[123] On the basis of this long-standing and consistent jurisprudence, article 3 of the European Convention implies an obligation

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[121] "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[122] In the same vein, the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live provides, in its article 6, that "[N]o alien shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment (...)".

[123] The Inter-American Commission on Human Rights has found admissible several applications impugning States members of the Organization of American States for ill-treatment (violation of the Pact of San José, art. 5), without, however, considering the merits: see *Sebastián Echaniz Alcorta and Juan Victor Galarza Mendiola v. Venezuela*, Report No. 37/06, Petition 562-03, 15 March 2006, *Annual Report of the Inter-American Commission on Human Rights* 607, OEA/Ser.L/V/II.127 doc. 4, para. 2; *Jesús Tranquilino Vélez Loor v. Panama*, Report No. 95/06, Petition 92-04, 23 October 2006, *Annual Report of the Inter-American Commission on Human Rights* 500, OEA/Ser.L/V/II.127 doc. 4, para. 1; *Hugo Armendáriz v. United States* and *Marino López et al. v. Colombia* (notes 111 and 112 above).

not to expel a person to a country in which that person may be subjected to torture or to inhuman or degrading treatment.[124]

75. It is apparent from this wide-ranging, teleological interpretation of the obligations on States parties to this Convention that article 3 not only prohibits contracting States from inflicting torture or any other inhuman or degrading treatment, but also imposes the related obligation not to place an individual under their jurisdiction in a situation in which that person could be a victim of such a violation, even if committed by a third State.[125] According to the European Commission of Human Rights in *Kirkwood v. United Kingdom*, this interpretation "(...) is based upon the unqualified terms of article 3 of the Convention, and the requirement which this read in conjunction with Article 1 imposes upon the Contracting Parties to the Convention to protect 'everyone within their jurisdiction' from the real risk of such treatment, in the light of its irremediable nature".[126]

76. The Court's reasoning has been absorbed into doctrine by means of the "protection by ricochet" theory,[127] by which reliance may be had on the "rights arising under the Convention, not guaranteed as such by it but benefiting from its indirect protection as an associated guaranteed right".[128] The prohibition on returning an alien to that person's torturers or to a country where he or she may be subjected to torture or to cruel or inhuman or degrading treatment is an implicit obligation stemming from the nature of the right protected.

77. The European Court, in *Soering v. United Kingdom*,[129] found occasion to clarify its reasoning. It seems to have based itself on three principles, namely:

(i) The irrelevance of the international responsibility of the third State, since this is not an extraterritorial application of article 3 with a view to securing compliance by a third State with the provisions of a treaty to which it is not necessarily a party;

(ii) The primacy of the European Convention over the other treaty obligations of States parties;

(iii) The implicit obligation contained in article 3 to oppose the extradition or expulsion of a person exposed to the risk of torture or inhuman or degrading treatment.

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[124] European Court of Human Rights, *Chahal v. United Kingdom*, Judgement of 15 November 1996, Series A, 1996-V, No. 22, p. 1853, paras. 73-74.

[125] See Vincent Chetail, "Les droits des réfugiés à l'épreuve des droits de l'homme: Bilan de la jurisprudence de la Cour européenne des droits de l'homme sur l'interdiction du renvoi des étrangers menacés de torture et de traitement inhumains ou dégradants", *Revue belge de droit international*, 2004/1, p. 161.

[126] European Commission of Human Rights, application No. 10479/83, *Kirkwood v. United Kingdom*, decision of 12 March 1984, *Decisions and Reports*, p. 183. For commentary on the grounds underpinning the interpretation in this case, see Chetail (note 125 above), pp. 161-162.

[127] Frédéric Sudre, "La notion de 'peines et traitements inhumains ou dégradants' dans la jurisprudence de la Commission et de la Cour européenne des droits de l'homme", *Revue générale de droit international public*, 1984, pp. 866-868; see also Gérard Cohen-Jonathan, *La Convention européenne des droits de l'homme* (Paris, Economica, 1989), pp. 84 and 304.

[128] F. Sudre, "Extradition et peine de mort: arrêt *Soering* de la Cour européenne des droits de l'homme du 7 juillet 1989", *Revue générale de droit international public*, 1990, p. 108.

[129] European Court of Human Rights, *Soering v. United Kingdom*, Judgement of 7 July 1989, *Decisions and Reports*, p. 33, para. 86.

78. Some 20 years later, the debate over the Court's reasoning in *Soering* does not appear to have been exhausted.[130] There is, however, no doubt that, even if the investigation is confined solely to conventions, article 3 of the European Convention gives rise to a peremptory norm, given the provision of article 15 (2) of the Convention that there shall be no derogation from the prohibition of torture and inhuman or degrading treatment, even in time of war or other public emergency threatening the life of the nation. This is, moreover, the reasoning most frequently invoked in the legal literature to justify measures for the expulsion (in the broad sense in which it is understood here) of aliens. From the standpoint of international responsibility, the expelling State would become complicit in the actions of the receiving State, in that, through the expulsion, it would have enabled the latter to commit the unlawful act.

79. It is now time to examine in greater depth the predicate conduct prohibited by the norm. It should be pointed out first that, as we have seen, article 3 of the European Convention prohibits "inhuman or degrading treatment or punishment". The International Covenant on Civil and Political Rights adds a word to the second part of the proscribed behaviour, referring to cruel, inhuman or degrading treatment or punishment; this wording from article 7 of the Covenant is reproduced in the American Convention (art. 5, para. 2) and the African Charter (art. 5). It is therefore this formulation which will be used in the present report.

a. Torture

80. Torture is regarded as the most serious act in the hierarchy of forms of violation of the physical integrity of the human person.[131]

81. Under the terms of article 1, paragraph 1, of the United Nations Convention against Torture of 1984:

> "The term 'torture' means any act by which severe pain or suffering, whether physical or mental, is inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public

[130] Apart from the references already cited, see also C. Van Den Wyngaert, "Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?", *International and Comparative Law Quarterly*, 1990, pp. 757-779; C. Warbrick, "Coherence and the European Court of Human Rights: the Adjudicative Background to the *Soering* Case", *Michigan Journal of International Law*, 1990, pp. 1073-1096; S. Breitenmoser and G. E. Wilms, "Human Rights v. Extradition: The *Soering* Case", ibid., pp. 845-886; B. I. Richard, "The *Soering* Case", *American Journal of International Law* 1991, pp. 128-149; H. G. Vander Wilt, "*Après Soering*: the Relationship between Extradition and Human Rights in the Legal Practice of Germany, the Netherlands and the United States", *Northwestern Interdisciplinary Law Review* 1995, pp. 53-80; S. Zohke and J.-C Pastille, "Extradition and the European Convention — *Soering* Revisited", *Zeitschrift für ansländischer öffentlicher Recht und Völkerrecht*, 1999, pp. 749-784; see also Chetail (note 125 above), p.165.

[131] See Robert Kolb, "La jurisprudence internationale en matière de torture et de traitement inhumains ou dégradants", *Revue universelle des droits de l'homme*, vol. 15, No. 7-10, 15 December 2003, p. 225.

official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

82. As the Trial Chamber of the International Tribunal for the Former Yugoslavia noted in *Furundzija*,[132] this legal definition of torture rests on four essential elements:

(i) A material or physical element: the infliction, by act or omission, of severe pain or suffering, whether physical or mental;

(ii) A psychological element: the act or omission must be intentional;

(iii) A purpose: the torture must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discrimination on any ground against the victim or a third person;

(iv) An element of instrument or agency: at least one of the persons involved in the torture process must be a public official or must act in a non-private capacity, e.g., as a de facto organ of a State or any other authority-wielding entity.

83. In the light of these elements, there is no doubt that a person who has been, or is in the process of being, expelled may be a victim of acts of torture, whether in the expelling State or in the State of destination. Moreover, the Committee against Torture established by the 1984 Convention against Torture, which began its operations only in 1991, has received several hundred individual communications, virtually all of which relate to cases of expulsion or extradition of an individual to a State where he or she risks being subjected to torture or ill-treatment.[133] The solutions adopted by the Committee in these cases are more or less identical and somewhat repetitive.[134] It will thus suffice to refer to a number of cases by way of illustration.[135]

84. In *Mutombo v. Switzerland* (1994), the author of the application clandestinely became a member of a political movement in Zaire, the Union pour le démocratie et le progrès social. He was arrested shortly afterwards, in 1989, and locked up in a one-metre square cell, and for four days he was subjected to electric shocks, beaten with a rifle butt and struck on the testicles until he lost consciousness. During his imprisonment, he received no medical treatment for a head injury caused by the torture inflicted on him. On being released in 1990, he fled to Switzerland. Despite medical certificates indicating that his scars corresponded with the alleged maltreatment (torture), an expulsion order was issued against him by Switzerland.

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[132] *Furundzija* (note 120 above), para. 162.

[133] See Kolb (note 131 above), pp. 261 and 266.

[134] On the work of this Committee, see inter alia: C. Ingelse, *The United Nations Committee Against Torture. An Assessment*, The Hague/London/Boston, 2001; L. Holmström (ed.), *Conclusions and Recommendations of the United Nations Committee Against Torture: Eleventh to Twenty-Second Session (1993-1999)*, The Hague/London/Boston, 2000; see also A. Dormenval, "United Nations Committee Against Torture: Practice and Perspectives", *Netherlands Quarterly of Human Rights*, vol. 8, 1990, pp. 26 ff.; M. Nowak, "The Implementation Functions of the United Nations Committee Against Torture", in *Mélange F. Ermacora*, N. P. Engel, Strasbourg/Kehl, 1988, pp. 493 ff.

[135] Kolb summarizes them in his study cited above (note 131 above; see, in particular, pp. 268-273), and this is drawn on in the present analysis.

85. Against this decision to expel him, he claimed a violation of article 3 of the Convention against Torture, which provides that:

> "1. No State party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he will be in danger of being subjected to torture.
>
> "2. For the purpose of determining if there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant, or mass violations of human rights".

86. After indicating that it needed to determine whether there were substantial grounds for believing that Mr. Mutombo would be in danger of being subjected to torture, the Committee stated that:

> "The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he would return."

It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in the country does not as such constitute a sufficient ground for determining that a person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist that indicate that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that the person cannot be considered to be in danger of being subjected to torture in his specific circumstances".[136]

87. According to the Committee, there was no doubt that in the case in question substantial grounds existed for believing that the author was in danger of being subjected to torture in his country of origin. Among the many elements supporting this belief were his ethnic background, his political affiliation, his detention history, his desertion from the army in order to flee the country and the arguments adduced by him in his request for asylum, which could be considered defamatory towards Zaire, together with a situation of systematic human rights violations in that country.[137]

88. The same criteria were applied in *Alan v. Switzerland* (1996). The author of the communication was a sympathizer of an outlawed Kurdish-Marxist/Leninist organization. In 1983, he was arrested in Turkey; he stated that he had been brutally tortured for 36 days by electric shocks. After having been arrested again several times in 1988 and 1989, he fled to Switzerland. Despite a medical report which confirmed that scars on his body were compatible with the torture described, Switzerland decided to expel him.[138] The Committee stated that:

> "In the instant case, the Committee considers that the author's ethnic background, his political affiliation, his detention history, and his internal exile should all be taken into account when determining whether he would be in danger of being subjected to torture upon his return. The State party has pointed to contradictions and inconsistencies in the author's story, but the

[136] *Mutombo v. Switzerland*, A/49/44, annex V, Sect. B, communication No. 13/1993, para. 9.3.
[137] Ibid., para. 9.4.
[138] Communication No. 21/1995, A/51/44, annex V, Sect. A, paras. 11.2-11.6.

> Committee considers that complete accuracy is seldom to be expected by victims of torture and that such inconsistencies as may exist in the author's presentation of the facts are not material and do not raise doubts about the general veracity of the author's claims".[139]

89. Next, recalling a number of cases of ill-treatment referred to by Mr. Alan, the Committee stated that, under the circumstances, it "finds that the author has sufficiently substantiated that he personally is at risk of being subjected to torture if he returned to Turkey".[140] It "concluded that the expulsion of return of the author to Turkey in the prevailing circumstances would constitute a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment".[141]

90. In *Aemei v. Switzerland* (1997), the Committee followed a line of reasoning that was subsequently confirmed by international courts. It affirmed the *jus cogens* nature of the norm set forth in article 3. The Committee:

> "would recall that the protection accorded by article 3 of the Convention is absolute. Whenever there are substantial grounds for believing that a particular person would be in danger of being subjected to torture if he was expelled to another State, the State party is required not to return that person to that State. The nature of the activities in which the person engaged is not a relevant consideration in the taking of a decision in accordance with article 3 of the Convention".[142]

91. This unequivocal legal precedent by non-jurisdictional oversight bodies is well established, given the abundance of consistent decisions by jurisdictional bodies.[143]

92. We will begin with the case law of the International Tribunal for the Former Yugoslavia. The Tribunal stated its opinion on torture for the first time in *Delalic (Celebici)* (1998). While, where the definition is concerned, the Tribunal's Trial

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[139] Ibid., para. 11.3.

[140] Ibid., para. 11.4.

[141] Ibid., para. 11.6.

[142] *Aemei v. Switzerland*, communication No. 34/1995, A/52/44, annex V, sect. B.2, para. 9.8.

[143] *A.D. v. Netherlands*, communication 96/1997; *A.L.N. v. Switzerland*, communication 90/1997; *C. R. Núñez Chipana v. Venezuela*, communication 110/1998; *E.A.C. v. Switzerland*, communication 28/1995; *G.T. v. Switzerland*, communication 137/1999; *H.A.D. v. Switzerland*, communication 126/1999; *H.D. v. Switzerland*, communication 112/1998; *I.A.O. v. Sweden*, communication 65/1997; *J.A. Arana v. France*, communication 63/1997; *J.U.A. v. Switzerland (1)*, communication 100/1997; *K.M. v. Switzerland*, communication 107/1998; *K.N.C. v. Switzerland*, communication 94/1997; *K.T. v. Switzerland*, communication 118/1998; *M.B.B. v. Sweden (2)*, communication 104/1998; *N.P. v. Australia*, communication 106/1998; *P.Q.L. v. Canada*, communication 57/1996; *S.C. v. Denmark*, communication 143/1999; *S.M.R. and M.M.R. v. Sweden*, communication 103/1998; *T.P.S. v. Canada*, communication 99/1997; *V.X.N. and H.N. v. Sweden*, communications 130 and 131/1999; *X. v. Netherlands*, communication 36/1995; *X. v. Switzerland*, communication 27/1995; *X. v. Switzerland*, communication 38/1995; *X., Y. and Z. v. Sweden*, communication 61/1996.

Chamber relied on that contained in the Convention against Torture of 1984,[144] its decision is particularly noteworthy in that it asserts that the prohibition of torture is customary in nature and applies both in peacetime and in times of armed conflict, whether internal or international.[145] The Chamber confirmed this some months later in *Furundzija*[146] after clearly recalling the doctrine governing this rule:

> "Firstly, given the importance that the international community attaches to the protection of individuals from torture, the prohibition against torture is particularly stringent and sweeping. States are obliged not only to prohibit and punish torture, but also to forestall its occurrence: it is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irremediably harmed. Consequently, States are bound to put in place all those measures that may pre-empt the perpetration of torture. As was authoritatively held by the European Court of Human Rights in *Soering*, international law intends to bar not only actual breaches but also potential breaches of the prohibition against torture (as well as any inhuman and degrading treatment. It follows that international rules prohibit not only torture but also (i) the failure to adopt the national measures necessary for implementing the prohibition and (ii) the maintenance in force or passage of laws which are contrary to the prohibition".[147]

93. This decision of the Trial Chamber was confirmed by the Appeals Chamber, which "finds it inconceivable that it could ever be argued that the acts charged in paragraph 25 of the Amended Indictment, namely, the rubbing of a knife against a woman's eyes and stomach, coupled with the threat to insert the knife into her vagina, once proven, are not serious enough to amount to torture".[148]

94. The rule prohibiting torture has a special legal consequence in the contact of the law of State responsibility. The Tribunal notes that:

> "Normally, the maintenance or passage of national legislation inconsistent with international rules generates State responsibility and consequently gives rise to a corresponding claim for cessation and reparation (*lato sensu*) only when such legislation is concretely applied. By contrast, in the case of torture, the mere fact of keeping in force or passing legislation contrary to the international prohibition of torture generates international State responsibility. The value of freedom from torture is so great that it becomes imperative to preclude any national legislative act authorizing or condoning torture or at any rate capable of bringing about this effect".[149]

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[144] The Tribunal's Trial Chamber revised its jurisprudence relating to the definition of torture in *Kunarac* et al. (2001). "In view of the international instruments and jurisprudence reviewed above, the Trial Chamber is of the view that the definition of torture contained in the torture convention cannot be regarded as the definition of torture under international customary law which is binding regardless of the context. ... The Trial Chamber, therefore, holds that the definition of torture contained in article 1 of the torture convention can only serve, for present purposes, as an interpretational aid" (*Kunarac, Kovac and Vukovic* (2001), para. 482; see also para. 496).

[145] *Delalic (Celebici)*, Judgement of 16 November 1998, paras. 446 and 454.

[146] *Furundzija* (note 120 above), para. 155.

[147] Ibid., para. 148.

[148] *Furundzija (Appeal, 2000)*, Appeals Chamber Judgement of 21 July 2000, para. 114.

[149] *Furundzija* (note 120 above), para. 150.

95. Moreover, in the wake of *Delalic* the Trial Chamber stated:

> "151. Furthermore, the prohibition of torture imposes upon States obligations *erga omnes*, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued.
>
> "152. Where there exist international bodies charged with impartially monitoring compliance with treaty provisions on torture, these parties enjoy priority over individual States in establishing whether a certain State has taken all the necessary measures to prevent and punish torture and, if they have not, in calling upon that State to fulfil its international obligations. The existence of such international mechanisms makes it possible for compliance with international law to be ensured in a mutual and impartial manner.
>
> (...)
>
> "153. While the *erga omnes* nature just mentioned appertains to the area of international enforcement (*lato sensu*), the other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.
>
> "154. Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate".[150]

96. This position that the prohibition of torture is a peremptory norm was also taken by the European Court of Human Rights in *Al-Adsani v. United Kingdom*. The Court notes that "there have been a number of judicial statements to the effect that the prohibition of torture has attained the status of a peremptory norm or *jus cogens*"; it states "on the basis of [the] authorities, that the prohibition of torture has achieved the status of a peremptory norm in international law".[151]

97. Well before that case, the European Court of Human Rights had had occasion to rule on the prohibition of the expulsion of an asylum-seeker on grounds of risk of torture in *Cruz Varas and others v. Sweden* (1991). The case related to the expulsion of Chilean nationals to their country of origin at the time when General Pinochet

[150] Ibid., paras. 151-154.

[151] *Al-Adsani v. United Kingdom*, Judgement of 21 November 2001, paras. 60 and 61.

was still in power there. Transposing the wording of *Soering* to the case in question, the Court accepted that a decision to expel an asylum-seeker could engage the responsibility of the expelling State under the 1984 Convention where there were "substantial grounds" for believing that the person concerned would face, in the country of destination, "a real risk of being subjected to torture or to inhuman or degrading treatment or punishment".[152] In the case before it, the Court considered that the expulsion of the applicant to his country of origin had not exposed him to a real risk of being subjected to such treatment on his return to Chile in October 1989. Accordingly, there had been no violation by Sweden of the obligations under article 3 of the European Convention on Human Rights.

98. The Court confirmed this precedent in *Vilvarajah and others v. United Kingdom* (1991). At issue was the United Kingdom's decision to return five Sri Lankan asylum-seekers to their country. The Court recalled that article 3 of the above-mentioned Convention prohibits the return of a refugee who would be at real risk of being subjected to ill-treatment in his or her country, while nevertheless considering that in the case in question the persons being returned would not run such a risk. Applying here a "national standard" rather than a "minimum" international standard, the Court considered that it was not established that the applicants' "personal position was any worse than the generality of other members of the Tamil community or other young male Tamils who were returning to their country". Admittedly, given the unsettled situation, "there existed the possibility that they might be detained and ill-treated, as appears to have occurred previously in the cases of some of the applicants"; but their expulsion did not constitute a breach of article 3 of the European Convention on Human Rights.[153]

99. These precedents have been summarized as follows:

> "First: there must be substantial grounds for believing that expulsion exposes the person concerned to a real risk of treatment contrary to article 3. Second: the approach is subjective, in that what counts is that the person concerned personally runs this risk. Third: the objective situation in the third State has indicative value, as the widespread practice of maltreatment also makes the risk to the person concerned more probable. The contrary is true if the position of the person concerned does not appear to be distinguished from that of all members of the community to which he or she belongs on the soil of the State to which expulsion is to take place; this constitutes an argument against sufficient objective risk".[154]

100. From these international precedents, of which *Furundzija* constitutes the most advanced illustration, three major findings emerge.[155] First, the prohibition of torture extends not only to actual violations but also to potential violations of the physical and moral (or mental) integrity of the human person; consequently, the

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[152] European Court of Human Rights, Judgement of 20 March 1991, Series A, No. 201; judgement published in *Revue Universelle des Droits de l'Homme*, 1991, No. 209, paras. 69 ff.

[153] European Court of Human Rights, Judgement of 30 October 1991, Series A, No. 215, paras. 104 ff., particularly para. 111. See judgement published in *Revue Universelle des Droits de l'Homme*, 1991, p. 537.

[154] Kolb (note 131 above), p. 270. The author recalls that this criterion of "non-discrimination" has been criticized in the legal literature; see, inter alia, F. Sudre, in Pettiti, Decaux and Imbert (note 41 above), p. 174, note 16.

[155] See Kolb (note 131 above), p. 273.

State has not only an obligation to intervene after the event to remedy it, but also the duty to pre-empt it through diligent action, including the prompt elimination of laws contrary to the rule of prohibition.[156] Next, the prohibition of torture imposes obligations *erga omnes*; all States have a right to act and an interest in acting pursuant to this rule.[157] Lastly, the prohibition is a rule of *jus cogens*, a peremptory norm that cannot be derogated from under any circumstances. It occupies a high rank commensurate with the supreme values it protects.[158]

b. Cruel, inhuman or degrading treatment

i. Overview

101. As already indicated, the prohibition of "cruel, inhuman or degrading treatment or punishment" (the wording of the Universal Declaration of Human Rights) is embodied, with a few slight variations in wording, in the formulations used in the main international human rights instruments.

102. The legal instruments in question do not define the various categories that make up this part of the norm prohibiting violation of the rights of the person and limiting the State's right of expulsion. International jurisprudence has filled this gap, notably through the ruling by the International Tribunal for the Former Yugoslavia in *Delalic (Celebici)*, cited above. The Trial Chamber defines "inhuman treatment" as follows:

> "[I]nhuman treatment involves acts or omissions that cause serious mental or physical suffering or injury or constitute a serious attack on human dignity ... In sum, the Trial Chamber finds that inhuman treatment is an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity".[159]

103. The fundamental difference from the definition of torture is, on the one hand, that inhuman (cruel or degrading) treatment is not necessarily administered for the purpose of obtaining information or a confession; and, on the other, that such treatment must not be necessarily or exclusively inflicted by agents of the State acting under cover of it.

104. As for "cruel treatment", the Chamber, in the same case, gives the following definition:

> "[C]ruel treatment constitutes an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. As such, it carries an equivalent meaning and therefore the same residual function for the purposes of common article 3 of the Statute as inhuman treatment does in relation to grave breaches of the Geneva Conventions. Accordingly, the offence of torture under common article 3 of the Geneva Conventions is also included within the concept of cruel treatment.

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[156] *Furundzija* (note 120 above), paras. 148-150.

[157] Ibid., paras. 151-153.

[158] Ibid., paras. 153-157.

[159] *Delalic* (1998), paras. 442 and 543; see also *Blaskic* (2000), para. 154.

> Treatment that does not meet the purposive requirement for the offence under common article 3, constitutes cruel treatment".[160]

105. In the light of these two definitions, it would appear that the concept of "cruel treatment" is more comprehensive, including both inhuman treatment and certain aspects of the crime of torture, although it is not fully coterminous with that crime. Nevertheless, all these acts or forms of treatment constitute attacks on human dignity. Subsequent to the *Delalic* judgement, the Tribunal referred to outrage upon human dignity as a consequence of inhuman treatment in *Aleksovski* (1999).[161]

106. The list of acts characterized as cruel, inhuman or degrading treatment is long and varied, and it would be tedious to make an inventory here of those that emerge from the jurisprudence. More worthwhile is to identify the criteria for the characterization. In its case law, the European Court of Human Rights has consistently held that:

> "ill-treatment must attain a minimal level of severity if it is to fall in the scope of Article 3 (art. 3). The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects, and in some cases, the sex, age and state of health of the victim, etc.".[162]

107. It was in *Soering* that the European Court of Human Rights began to establish its case law in relation to the prohibition of extradition, and by extension expulsion, on the grounds of the risk of cruel, inhuman or degrading treatment. The central issue the Court had before it was whether the extradition of an individual by a State party to the European Convention to a third State can engage the responsibility of the State party under article 3 of the Convention by reason of the ill-treatment the person extradited may face in the country of destination. To this question the Court responded, in its judgement of 7 July 1989, that no right not to be extradited is as such protected by the Convention; nevertheless:

> "insofar as a measure of extradition has consequences adversely affecting the enjoyment of the Convention right, it may, assuming that the consequences are not too remote, attract the obligations of a Contracting State under the relevant Convention guarantee".[163]

108. As already indicated in paragraph 76 of the present report, the legal literature gives this mechanism the name "protection by ricochet",[164] the principle of which may be presumed to have originated in article 1 of the Convention and the general

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[160] Ibid., para. 552.

[161] *Aleksovski* (1999), para. 56; see also *Blaskic* (2000), para. 681.

[162] European Court of Human Rights, *Ireland v. United Kingdom*, Judgement of 18 January 1978, Series A, No. 25, para. 162; see also, in the context of extradition and expulsion, *Soering v. United Kingdom* (note 129 above), para. 100; *Cruz Varas and others v. Sweden* (note 152 above), para. 83.

[163] *Soering v. United Kingdom*, Judgement of 7 July 1989, Series A, No. 161, para. 85.

[164] Cohen-Jonathan, *La Convention européenne des droits de l'homme* (note 127 above), pp. 84 and 304; see also F. Sudre, "Extradition et peine de mort: arrêt *Soering* de la Cour européenne des droits de l'homme du 7 juillet 1989", *Revue Internationale de Droit International Public*, 1990, p. 108.

obligation of the High Contracting Parties to accord the rights defined in the Convention to "all persons under their jurisdiction".[165]

109. One could argue, as the respondent Government did in *Soering*, that the State which deports or extradites a person is not responsible as such for the violation which is only opposable to the receiving State where the ill-treatment takes place. That was not the view of the European Commission on Human Rights, which, in its report, acknowledged that the deportation or extradition would under certain circumstances involve the responsibility of the deporting or extraditing Convention State if, for example, that State deported or extradited a person to a country where it was certain or where there was a serious risk that the person would be subjected to torture or inhuman treatment. The basis of State responsibility, the report of the Commission stressed, "lies in the exposure of a person by way of deportation or extradition to inhuman or degrading treatment in another country".[166] In so stating, the Commission was consistent with its previous case law, which it cited in its report.[167]

110. The *Soering* precedent was subsequently confirmed in other judgements of the Court,[168] one of the most recent of which is that handed down on 26 July 2005 in *N. v. Finland*, concerning the expulsion of a former member of the special forces of Mobutu, the former head of State of Zaire, now the Democratic Republic of the Congo. The Court considered that the person concerned took part "in various events during which dissidents seen as a threat to [...] Mobutu were singled out", and that "there is reason to believe that the applicant's situation could be worse than that of most other former Mobutu supporters"; moreover, in view of possible "feelings of revenge" in relatives of dissidents affected by his actions, there were "substantial grounds for believing that the applicant would be exposed to a real risk of treatment contrary to Article 3 [of the European Convention on Human Rights (prohibition of inhuman treatment)], if expelled". The Court therefore enjoined Finland not to expel the person concerned.[169]

111. The obligation thus asserted rests on the axiological foundations of the Convention. As a former judge of the European Court of Human Rights wrote:

> "The absolute prohibition of torture and inhuman or degrading treatment or punishment in the European Convention on Human Rights embodies the fundamental values of democratic societies. Consequently, a State party would be behaving in a manner incompatible with the underlying values of the Convention if it knowingly returned a fugitive, heinous though the crime he is alleged to have committed might be, to another State where there were

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[165] Ibid., p. 109.

[166] *Soering v. United Kingdom*, application No. 14038/88, Report of the Commission, 19 January 1989, para. 96.

[167] See decision of 3 May 1983 in *Altun v. Federal Republic of Germany*, application No. 10308/83, *Decisions and Reports*, vol. 36, pp. 209-235; decision of 12 March 1984 in *Kirkwood v. United Kingdom*, application No. 10479/83, *Decisions and Reports*, vol. 37, pp. 156-191.

[168] See, for example, *D. v. United Kingdom*, in which the Court found that there was a risk of the applicant's being exposed to inhuman treatment (and hence a breach of article 3 of the Convention) if he was expelled to St. Kitts despite his critical state of health and the lack of appropriate medical equipment on the island.

[169] Source *Agence France-Presse*, 27 July 2005. See European Court of Human Rights, *N. v. Finland*, application No. 38885/02, Judgement of 26 July 2005 (English only).

substantial grounds for believing that the person concerned faced a risk of torture [or maltreatment]".[170]

This opinion matches the conclusion the Court reached in *Soering*, when it decided that despite the absence of an explicit reference in the text of article 3 of the Convention:

"this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article (art. 3)".[171]

112. The rule applies to expulsion,[172] whether or not the expulsion or extradition decided upon is carried out, as one author has written: "following the Commission, the Court so decided in its *Soering* decision of 7 July 1989 (para. 90). After the judgements in *Soering* (decision to extradite to the United States not carried out), *Cruz-Varas* of 20 March 1991 (expulsion to Chile, Series ANI. 201, para. 70) *Vilvarajah* of 30 October 1991 (return of Tamils to Sri Lanka; series ANI. 215, paras. 102-103), the approach under European law is perfectly clear: once they have been the subject of a decision, expulsions, extraditions or returns, whether carried out or not, are capable of constituting inhuman or degrading treatment".[173]

113. This is not the case when no expulsion order has been made, as is apparent moreover from *Vijayanathan and Pusparajah v. France*.[174] Even where the oversight bodies of the European Convention develop case law on "imminent violation" in the context of expulsion, they limit it to cases of forced removal measures for aliens which have already been decided upon but not yet carried out.[175]

114. What about a case where an individual is expelled to a State where he or she risks facing violence committed not by organs of the State but by individuals acting in a private capacity?

115. The European Court of Human Rights had such a case before it in *H.L.R. v. France* (1997). The applicant, who was being expelled to Colombia, argued the risk of being subjected in that country to acts of torture or inhuman acts committed by private groups, namely the drug traffickers who had recruited him as a courier. Since *Soering*, the scope of article 3 of the European Convention has been extended to acts by State authorities which could lead to torture in the third State by authorities of that State. In *H.L.R. v. France*, the Court further expanded it to cover non-State risks on the assumption that the third State was not in a position to protect the person concerned: it considered that there was a breach of article 3 of the 1950 Convention if a State exposed an individual to a real danger of inhuman treatment committed by persons acting in a private capacity. The Court wrote:

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[170] Juan Antonio Carrillo-Salcedo, commentary to article 1, in Pettiti, Decaux and Imbert (note 41 above), p. 140.

[171] *Soering v. United Kingdom*, Judgement of 7 July 1989, Series A, No. 161, para. 88.

[172] See F. Sudre, commentary to article 3, in Pettiti, Decaux and Imbert (note 41 above), p. 163.

[173] Ibid., p. 173.

[174] See application No. 17550/90 and 17825/91, Report of the Commission, 5 September 1991, and Judgement of the European Court of Human Rights, 27 August 1992, Series A, No. 241-B.

[175] See Ronny Abraham, commentary to article 25 of the European Convention, in Pettiti et al. (note 41 above), p. 588.

> "Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention (art. 3) may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection".[176]

116. The European case law on prohibition of the expulsion of an individual to a State where he or she is at risk of ill-treatment is followed by the oversight bodies of the universal human rights instruments. The United Nations Committee against Torture has ruled to this effect, as we have seen, in *Mutombo v. Switzerland* (1994), where it considered that "substantial grounds exist for believing that the author would be in danger of being subjected to torture".[177] With regard to the risk of ill-treatment in general, i.e. including torture and cruel, inhuman or degrading treatment or punishment, the Human Rights Committee expressed an opinion on this subject in *Alzery v. Sweden*.[178]

117. The applicant, a chemistry and physics teacher at Cairo University, had been active in an organization involved in Islamist opposition. Using a false visa, he managed to enter Saudi Arabia, where he lived until his departure for the Syrian Arab Republic. He was forced to leave that country since it had extradited a number of Egyptian nationals back to their country of origin. Using a false Danish passport, he was able to enter Sweden, where he immediately sought asylum and admitted having used a false passport to enter the country. In support of his application for asylum, he reported that he had been physically assaulted and tortured in Egypt; that he had felt that he was being watched and that his home had been searched; that after his departure from Egypt he had been sought at his parents' home; that he feared being brought before a military court if he returned to Egypt; and that he was afraid of being arrested and tortured.[179]

118. The first substantive issue before the Committee was whether the applicant's expulsion from Sweden to Egypt exposed him to a real risk of torture or other ill-treatment in the receiving State, in breach of article 7 of the International Covenant on Civil and Political Rights:

> "11.4 The Committee notes that, in the present case, the State party itself has conceded that there was a risk of ill-treatment that — without more — would have prevented the expulsion of the author consistent with its human rights obligations (see *supra*, at para. 3.6). The State party in fact relied on the diplomatic assurances alone for its belief that the risk of proscribed ill-treatment was sufficiently reduced to avoid breaching the prohibition on refoulement.
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> "11.5 The Committee notes that the assurances procured contained no mechanism for monitoring of their enforcement. Nor were any arrangements made outside the text of the assurances themselves which would have provided

[176] *Recueil*, 1997 — III, No. 36, para. 40; *Revue Universelle des Droits de l'Homme*, 1997, p. 60.

[177] Decision of 27 April 1994, A/49/44, annex V, sect. B, communication No. 13/1993, para. 9.3.

[178] Decision of 25 October 2006, communication No. 1416/2005, A/62/40 (Vol. II), annex VII, sect. II; A/62/40 (Vol. II), annex VII, sect. II; *Revue Universelle des Droits de l'Homme*, 2006, vol. 27, No. 9-12, pp. 391 ff.

[179] Ibid., para. 3.2.

for effective implementation. The visits by the State party's ambassador and staff commenced five weeks after the return, neglecting altogether a period of maximum exposure to risk of harm. The mechanics of the visits that did take place, moreover, failed to conform to key aspects of international good practice by not insisting on private access to the detainee and inclusion of appropriate medical and forensic expertise, even after substantial allegations of ill-treatment emerged. In light of these factors, the State party has not shown that the diplomatic assurances procured were in fact sufficient in the present case to eliminate the risk of ill-treatment to a level consistent with the requirements of article 7 of the Covenant. The author's expulsion thus amounted to a violation of article 7 of the Covenant".[180]

119. The Special Rapporteur felt that it was mainly this development in case law, in particular with respect to the European Court of Human Rights, which Europe wished to reflect in article 19, paragraph 2, of the Charter of Fundamental Rights of the European Union, entitled "Protection in the event of removal, expulsion or extradition". This paragraph states that:

> "No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment".

120. In view of the foregoing analysis relating to the prohibition of torture and of cruel, inhuman or degrading treatment and the consequent obligation of States to protect all persons from such ill-treatment, including resident aliens or persons being expelled, the following draft article is proposed:

> ***Draft article 11: Obligation to protect persons being expelled from torture and cruel, inhuman or degrading treatment***
>
> **1. A State may not, in its territory, subject a person being expelled to torture or to cruel, inhuman or degrading treatment.**
>
> **2. A State may not expel a person to another country where there is a serious risk that he or she would be subjected to torture or to cruel, inhuman or degrading treatment.**
>
> **3. The provisions of paragraph 2 of this article shall also apply when the risk emanates from persons or groups of persons acting in a private capacity.**

ii. Specific case of children

121. A final aspect of the protection of aliens being expelled from the risk of ill-treatment concerns the protection of children. The Convention on the Rights of the Child of 20 November 1989, which entered into force on 2 September 1990, establishes the general framework for the protection of these rights in a manner which encompasses the risks of ill-treatment mentioned above. Article 2 of the Convention provides that:

> "1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of

[180] Ibid., pp. 406-407, paras. 11.4 and 11.5.

> any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
>
> 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members".

As a supplement to article 2 (cited above), article 3, paragraph 1, sets out a standard which summarizes the finalist philosophy that should underpin the implementation of all obligations of States under the Convention:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

In addition, article 37 provides as follows:

> "States Parties shall ensure that:
>
> (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
>
> (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
>
> (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
>
> (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action".

122. In terms of case law, the European Court of Human Rights accords a wide scope to the protection afforded under article 3 of the European Convention on Human Rights: on the one hand, as the Judges' Council Chamber of the Brussels Criminal Court recalled in *Ana Arizaga Cajamarca and her daughter Angélica Loja Cajamarca v. Belgium*, this protection "is absolute and does not allow for any exception, even when the attitude of the alien invoking it might be open to criticism"; on the other hand, such protection extends to every human being, whether an adult or a child. In the aforementioned case, the applicants argued at the factual level that Angélica Loja Cajamarca, aged 11 years, had been severely traumatized by her arrest and detention. They referred to "serious violations" of the

European Convention on Human Rights and of the Convention on the Rights of the Child. In fact, the applicants had been taken to the airport and held at the INAD detention centre. Ms. Cajamarca stated that she had been handcuffed and separated from her daughter, which increased the psychological trauma suffered by the latter. The Zaventem police categorically refused the applicants access to their legal counsel and a doctor, although the Office for Aliens had authorized this.

123. From a legal standpoint, the applicants maintained that the ill-treatment to which they were subjected constituted inhuman and degrading treatment, even torture, particularly in view of the young age and extreme vulnerability of Angélica; that the right to physical integrity was a fundamental right whose violation must cease immediately; and that the judge could therefore raise a motion to ensure the protection of this civil right without the need for a party to invoke such protection itself.

124. In this regard, in the *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* judgement on which the aforementioned Belgian court based its verdict, the European Court of Human Rights found Belgium guilty of inhuman and degrading treatment for the two-month detention of a five-year-old child in Transit Centre No. 127. The Court also found that the detention of a child in the same conditions as adults, namely in a closed centre initially designed for adults that was consequently not adapted to the needs of a child that age, constituted inhuman and degrading treatment contrary to article 3 of the European Convention on Human Rights. The Court emphasized the extreme vulnerability of children and noted that it was the responsibility of the Belgian State to take adequate measures to provide protection and care for them as part of its positive obligations under the aforementioned article 3.[181] It clarified that "the vulnerability of children must take precedence over their administrative status".[182] The Court's reasoning was as follows:

> "In view of the absolute nature of the protection afforded by article 3 of the Convention, it is important to bear in mind that this [the extremely vulnerable situation of the child] is the decisive factor and it takes precedence over considerations relating to the (...) applicant's status as an illegal immigrant".[183]

125. The Judges' Council Chamber of the Brussels Criminal Court produced the following wording in this regard: "Children must be considered, treated and protected as children, irrespective of their immigration status".[184] This is the quintessence of the European Court's jurisprudence, which enriches the scope of article 3 of the European Convention on Human Rights and also indirectly specifies the provisions of article 37 of the Convention on the Rights of the Child, referred to above.

126. While nothing to date indicates that such wording expresses a customary rule, it can be said that such wording reflects a marked tendency in this area. In any event, it may be assumed that there is little overt opposition to the protective

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[181] The Court dismissed Belgium's claims that the child's family was at the origin of, and thus responsible for, the alleged harm caused. The Court's reasoning was followed by the Judges' Council Chamber of the Brussels Criminal Court in its decision of 4 July 2007 in *Ana Arizaga Cajamarca and her daughter Angélica Loja Cajamarca v. Belgium*.

[182] Wording of the Judge's Council Chamber of the Brussels Criminal Court.

[183] European Court of Human Rights, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Judgement of 12 October 2006, para. 55.

[184] See note 181 above.

philosophy that underpins the Convention on the Rights of the Child and appears in various forms in regional instruments such as the African Charter on the Rights and Welfare of the Child, adopted in 1990.

127. In the light of these considerations, a specific norm is needed to protect children from the risk of torture and cruel, inhuman or degrading treatment irrespective of their immigration status.

Draft article 12: Specific case of the protection of children being expelled

1. A child being expelled shall be considered, treated and protected as a child, irrespective of his or her immigration status.

2. Detention in the same conditions as an adult or for a long period shall, in the specific case of children, constitute cruel, inhuman and degrading treatment.

3. For the purposes of the present article, the term "child" shall have the meaning ascribed to it in article 1 of the Convention on the Rights of the Child of 20 November 1989.

(iv) Respect for the private and family life of persons being expelled

128. Another limitation on the State's right of expulsion is the obligation to respect the right of individuals to a private and family life, including aliens in the process of expulsion. This right is enshrined in both international instruments and regional conventions for the protection of human rights. At the international level, while the Universal Declaration of Human Rights of 1948 is silent on this issue, article 17 of the International Covenant on Civil and Political Rights provides that:

> "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family (...).
>
> "2. Everyone has the right to the protection of the law against such interference or attacks".

129. Similarly, under the terms of article 5, paragraph 1 (b), of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, aliens enjoy "the right to protection against arbitrary or unlawful interference with privacy, family, home or correspondence".

130. At the regional level, article 8, paragraph 1, of the European Convention on Human Rights provides that "Everyone has the right to respect for his private and family life (...)". Article 7 of the Charter of Fundamental Rights of the European Union reproduces this provision in extenso. While the African Charter on Human and Peoples' Rights does not contain this right, in other respects it is deeply committed to the protection of the family (see article 18). Article 11, paragraph 2, of the American Convention on Human Rights establishes this right in the same terms as article 17 of the International Covenant on Civil and Political Rights, cited above. Under section III (c) of the Protocol to the European Convention on Establishment,[185] the contracting States, in exercising their right of expulsion, must

[185] European Convention on Establishment and the Protocol thereto, Paris, 13 December 1955, United Nations, *Treaty Series*, vol. 529, No. 7660, p. 141.

in particular take due account of family ties and the period of residence in their territory of the person concerned.

131. International jurisprudence has provided clarifications both on the content of the right to a private and family life and on the limitations on this right. In *Canepa v. Canada*, the United Nations Human Rights Committee provided a criterion to assess a violation of the right to family life. It declared:

> "The separation of a person from his family by means of his expulsion could be regarded as an arbitrary interference with the family and as a violation of article 17 if in the circumstances of the case the separation of the author from his family and its effects on him were disproportionate to the objectives of removal".[186]

132. Thus, through a process of deduction or reasoning *a contrario*, the criterion that emerges is one of proportionality between the interests of the expelling State — which, in expulsion cases, are public order and security — and the interests of the family, which, in this case, is the need to preserve the family life of the person being expelled. This was more clearly expressed in the position taken in a previous case, *Stewart v. Canada*, in which the Committee found that:

> "(...) the interference with Mr. Stewart's family relations that will be the inevitable outcome of his deportation cannot be regarded as either unlawful or arbitrary when the deportation order was made under law in furtherance of a legitimate state interest and due consideration was given in the deportation proceedings to the deportee's family connections".[187]

133. The practice of the European Court of Human Rights, in which the importance of respect for family life has increased, is moving in the same direction. In *Abdulaziz, et al. v. United Kingdom* (1985), the Court found that:

> "(...) this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals (...)".[188] However, in *C. v. Belgium* (1996), just over 10 years later, the Court decided that the essential question was:
>
> "(...) whether the deportation in issue struck a fair balance between the relevant interests, namely the applicant's right to respect for his private and family life, on the one hand, and the prevention of disorder or crime, on the other".[189]

134. The expelling State's interest in maintaining public order and security therefore seems to serve as the yardstick against which jurisprudence evaluates whether or not there has been a violation of the right to private or family life. In line

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[186] Views adopted on 3 April 1997, communication No. 558/1993, *International Human Rights Reports*, vol. 5 (1998), p. 76, para. 11.4.

[187] Views adopted on 1 November 1996, communication No. 538/1993, *International Human Rights Reports*, vol. 4 (1997), p. 429, para. 12.10.

[188] European Court of Human Rights, Judgement of 28 May 1985, Series A, No. 94, pp. 33-34, para. 67.

[189] European Court of Human Rights, Judgement of 7 August 1996, *Decisions and Reports* (1996-III), p. 924, para. 32.

with this criterion, in *Moustaquin*,[190] *Beldjoudi*[191] and *Nasri*,[192] the Court found that irrespective of the crime of which the individual was accused, the expulsion was illegal if it violated his or her right to private and family life. The Court had already reached a similar decision in *Berrehab*. In that case, the issue at stake was whether the decision to repatriate a father to Morocco despite his right to visit his 14-year-old daughter, custody of whom had been awarded to his Dutch ex-wife, constituted a violation of his right to respect for family life. In view of the difficulties for the applicant to visit the Netherlands from Morocco in order to exercise his visiting rights, the Court concluded that the expulsion measure prevented, in practice, the exercise of these rights and thus violated article 8 of the European Convention.[193]

135. However, in *Boughanemi*,[194] *C. v. Belgium*,[195] *Bouchelkia*[196] and *Boujlifa*, following a proportionality test between the interests of the family and the interests of the expelling State with respect to public order and security, the Court appears to have given decisive weight to offences committed by the applicants in assessing the decision to expel. In *Boujlifa*, which is particularly illustrative of the predominant trend in the Court's jurisprudence, the applicant was a Moroccan national who had been living in France since the age of 5, together with his parents and eight brothers and sisters, and had been educated there. He had been convicted of robbery and armed robbery and the French authorities had decided to expel him to Morocco. Despite his long residence in France and the fact that his entire family was living there, the European Court of Human Rights considered that "the requirements of public order outweighed the personal considerations which prompted the application".[197] In other words, any infringement of the right to respect for the private and family life of an individual — in this case, a person being expelled — must be proportionate to the aims pursued by the expelling State.[198]

136. The Court went much further in *Boughanemi* by finding that the applicant's expulsion was not contrary to article 8 of the European Convention on the grounds

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[190] European Court of Human Rights, Judgement of 18 February 1991, Series A, No. 193, pp. 18-20, paras. 41-46.

[191] European Court of Human Rights, Judgement of 26 March 1992, Series A, No. 234, pp. 26-28, paras. 71-80.

[192] European Court of Human Rights, Judgement of 13 July 1995, Series A, No. 320 B, pp. 23-26, paras. 34-46.

[193] *Berrehab v. Netherlands*, Judgement of 21 June 1988, Series A, No. 138, p. 16, para. 29; and the comments of Carlo Russo, a former judge at the European Court of Human Rights, in *Pettiti, Decaux* and *Imbert* (note 41 above), p. 318.

[194] European Court of Human Rights, Judgement of 24 April 1996, *Reports of Judgments and Decisions* (1996-II), p. 610.

[195] European Court of Human Rights, Judgement of 7 August 1996 cited above, pp. 924-925, para. 35.

[196] European Court of Human Rights, Judgement of 29 January 1997, *Reports of Judgments and Decisions* (1997-I), p. 63, para. 41.

[197] European Court of Human Rights, Judgement of 21 October 1997, *Reports of Judgments and Decisions* (1997-VI), p. 2265, para. 44.

[198] A judge appointed to replace the President of the Brussels Court of First Instance has adhered strictly to the practice of the European Court of Human Rights in this regard. In his order of 30 July 2007 concerning *Cajamarca and her daughter*, he underlined: "(...) that any violation of law with respect to the private and family life of an individual must, inter alia, be necessary in a democratic society, i.e. be proportionate to the aims pursued, in accordance with article 8 of the European Convention on Human Rights". (Case No. 07/5726/B, applicant: Ana Arizaga Cajamarca).

that Mr. Boughanemi had kept his Tunisian nationality and had apparently never sought French nationality; that he had retained links with Tunisia that went beyond the mere fact of his nationality, as the Government of the expelling country had claimed; and that he had not claimed before the European Commission of Human Rights that he could not speak Arabic, or that he had cut all ties with his country of birth, or that he had not returned there.[199]

137. Should the conclusion drawn from this be that aliens must break all ties and social and cultural links with their countries in order to protect themselves from expulsion? That question can be answered by analysing developments in the case law of the Court. Some of the major milestones have already been mentioned.

138. Until the *Ezzouhdi* judgement of 2001, to which we shall return, many comments concerning this issue fell into two distinct periods of the Court's jurisprudence. The first period began with the *Moustaquim v. Belgium* judgement,[200] which was the first to consider the expulsion of an alien as a violation of article 8. This was followed by the *Beldjoudi v. France*[201] and *Nasri*[202] judgements, which reached similar conclusions. At the time, the Court was considered to be particularly sympathetic to second-generation immigrants, who therefore enjoyed its protection from expulsion.

139. The second period in the development of the Court's jurisprudence began in 1996 with the aforementioned *Boughanemi* judgement, which ruled out any violation of article 8 by reason of expulsion. This was followed by judgements and decisions on admissibility in *Chorfi v. Belgium*,[203] *Boulchekia*,[204] *El Bouja*,[205] *Boujlifa*,[206] *Dalia*,[207] *Benrachid*,[208] *Baghli*,[209] *Farah v. Sweden*[210] and *A. v. Norway*,[211] which all reached similar conclusions. The implication was that the Court had taken a tougher line. However, this ignores the fact that, in the course of this trend in case law, the Court had upheld a violation of article 8 in the *Mehemi v. France* judgement of 26 September 1997 concerning an application submitted by a foreign national born in France, with a wife and three children, who had been sentenced to six years' imprisonment and permanent exclusion from French territory for smuggling hashish. In this instance, the Court clearly made a distinction between

[199] European Court of Human Rights, Judgement of 24 April 1996 (note 194 above), p. 610, para. 44. See also the decision of the United Nations Human Rights Committee *Ngoc Si Truong v. Canada*, communication No. 743/1997: Canada 05/05/2003, CCPR/C/77/D/743/1997 (Jurisprudence); and *Benjamin Ngambi and Marie-Louise Nebol v. France* (Human Rights Committee, communication No. 1179/2003: France 16/07/2004), in which a violation of the right to family life could not be claimed owing to the lack of a family in this case: since the applicant's claim was based on a false marriage certificate, the family reunification sought could not take place.

[200] European Court of Human Rights, Judgement of 18 February 1991 (note 190 above).

[201] European Court of Human Rights, Judgement of 26 February 1992 (note 191 above).

[202] European Court of Human Rights, Judgement of 13 July 1995 (note 192 above).

[203] European Court of Human Rights, Judgement of 7 August 1996.

[204] European Court of Human Rights, Judgement of 29 January 1997.

[205] European Court of Human Rights, Judgement of 26 September 1997.

[206] European Court of Human Rights, Judgement of 21 October 1997.

[207] European Court of Human Rights, Judgement of 19 February 1998.

[208] European Court of Human Rights, Judgement of 8 December 1998.

[209] European Court of Human Rights, Judgement of 30 November 1999.

[210] European Court of Human Rights, Judgement of 24 August 1999.

[211] European Court of Human Rights, Judgement of 21 March 2000.

cannabis and hashish, on the one hand, and heroin, on the other. The latter substance was involved in the *El Bouja*, *Dalia*, *Baghli*, *Farah* and *A. v. Norway* cases cited above.

140. The judgement delivered on 13 February 2001 in *Ezzouhdi v. France*[212] enabled the Court to supplement its case law on the issue of expulsion in relation to respect for the right to private and family life while also demonstrating the consistency of a jurisprudence that had been considered inconsistent when, in fact, it was merely highly nuanced.[213] Mr. Ezzouhdi, a Moroccan national born in 1970, had lived in France since the age of 5. He had received an education in France until leaving school at 16 years of age. His father had died in 1995 but his mother and two sisters lived in France. Between 1993 and 1997, he had received three criminal convictions, including one for the possession, acquisition and use of narcotic drugs: more specifically, cannabis. In 1997, he had been sentenced by the Bourg-en-Bresse Criminal Court to 18 months' imprisonment and permanent exclusion from French territory for the acquisition and use of heroin, cocaine and hashish. The Court of Appeal had upheld his exclusion from French territory and had increased his term of imprisonment to two years. Mr. Ezzouhdi had filed an application for judicial review but this had been rejected. He had therefore submitted his case to the European Court of Human Rights, claiming that France had violated article 8 of the European Convention on Human Rights.

141. In its Judgement of 13 February 2001, the Court handed down successive rulings with respect to the two paragraphs of article 8.

142. With regard to paragraph 1, the question was whether the applicant could claim to have a private and family life in France that had been disrupted by the expulsion order. The Court answered this question in the affirmative, recalling the date of Mr. Ezzouhdi's arrival in France, his age at that time and the fact that he had been educated in France and that he worked there. In reality, until that stage, the only question posed by the French Government had been whether an unmarried man with no children had a family life under the terms of article 8, paragraph 1. In other words, was the application related to a violation of the applicant's private and family life or only to a violation of his private life? The Court found that the applicant's family ties with his mother, brothers and sisters living in France were sufficient to constitute a family life. It should be recalled that, according to the United Nations Human Rights Committee, the term "family", for the purposes of the International Covenant on Civil and Political Rights:

> "(...) must be understood broadly as to include all those comprising a family as understood in the society concerned. The protection of such family is not necessarily obviated, in any particular case, by the absence of formal marriage bonds, especially where there is a local practice of customary or common law marriage. Nor is the right to protection of family life necessarily displaced by

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[212] European Court of Human Rights, application No. 471 160/99, Judgement of 13 February 2001.

[213] On this judgement, see particularly the comments of Brigitte Jarreau, "*L'éloignement des étrangers : interdiction définitive du territoire français (arrêts Ezzouhdi et Abdouni des 13 et 27 février 2001)*", Centre de recherches et d'études sur les droits de l'Homme et le droit humanitaire, Proceedings of the eighth information session, http://www.credho.org/cedh/session08/session08-06-01.htm, accessed 16 March 2009.

> geographical separation, infidelity, or the absence of conjugal relations. However, there must first be a family bond to protect".[214]

In the case in question, there can be no doubt that such a family bond existed between the applicant and his mother, brothers and sisters.

143. Another argument in the applicant's favour that was accepted by the Court was the absence of any tie other than that of nationality between Mr. Ezzouhdi and his native country: he had lived in Morocco only in his early youth and said he did not speak Arabic, and the French Government did not provide evidence that he had any other ties to that country.

144. The Court then embarked on a proportionality test that consisted of ascertaining whether the expulsion measure struck a fair balance between the relevant interests, namely the applicant's right to respect for his private and family life, on the one hand, and the protection of public order, the prevention of crime and the protection of health, on the other. In the Court's view, the seriousness of the offences committed by the applicant was a crucial factor in assessing this proportionality. In this case, it regarded the offences of which Mr. Ezzouhdi stood accused as being of limited impact, noting that he had been convicted of using and consuming drugs, not of selling them. The Court was thus of the opinion that those acts did not constitute a serious threat to public order, despite the finding of recidivism. The Court concluded that there was a lack of proportionality between the offences committed by the applicant and the harm done to his private and family life as a result of the expulsion measure, and found, lastly, that "the definitive nature of the exclusion seems unusually harsh".

145. Thus, the *Ezzouhdi* judgement represented a return, some three years after the aforementioned *Mehemi* judgement, to the European Court's position in previous cases in which it had found an expulsion measure to be in violation of article 8 of the European Convention. Nonetheless, it is not certain that this judgement truly marks a development, much less a break, in the Court's jurisprudence in a manner favourable to applicants. It is essentially "a decision consistent with previous ones that has the opposite effect, but only because the facts of the case so required".[215] What the Court requires in all cases — without distinguishing between "legitimate" and "illegitimate" families — is that, regardless of the extent of the relationships concerned, the resulting "family life" be pre-existing and effective, and marked by real and sufficiently close relations between its members:[216] such relations may take the form of shared living quarters, financial dependence (as in the case of minor

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[214] *Benjamin Ngambi and Marie-Louise Nébol v. France*, communication No. 1179/2003: France 16/07/2004, CCPR/C/81/D/1179/2003 (Jurisprudence).

[215] B. Jarreau (note 213 above), p. 3.

[216] See Carlo Russo, commentary to article 8, paragraph 1, in Pettiti, Decaux and Imbert (note 41 above), p. 316.

children),[217] regularly exercised visiting rights,[218] or ongoing relations between a father and his illegitimate children.[219]

146. With respect to article 8, paragraph 2, certain authors[220] and some judges of the Court, in their dissenting opinions, have raised the question of how the right to respect for private life is related to the right to family life. In its judgement of 21 October 1997 in *Boujlifa*, cited above, the Court dealt specifically with the right to private life, although its conclusions were of little avail to the applicant. The question thus remains: is there an overlap between private life and family life? Is the latter simply a component of the former? The *Ezzouhdi* judgement confirmed the formulation of the aforementioned *Baghli* judgement in this regard, without really settling the issue. Yet it is undeniable that private life and family life do not always coincide, since an unmarried adult, for example, may have a private life apart from his or her family life, which exists despite his or her unmarried status, as shown in *Ezzouhdi*. This suggests that equal weight should be given to these two components of the rights referred to in article 8, paragraph 1, in the proportionality test in expulsion cases.

147. Thus, it does not seem possible, given the current state of international human rights law, to consider the requirement of respect for private and family life in expulsion cases as a rule of customary law. Inferred from the right to private and family life enshrined, as seen above, in some of the principal international human rights instruments, this requirement appears, in light of the still-incipient case law of the United Nations Human Rights Committee and the more substantial case law of the European Court of Human Rights, as an obligation that may be generalized and extended to expulsion cases. On this basis, and in view of the developments outlined above, the following draft article is proposed:

Draft article 13: Obligation to respect the right to private and family life

1. The expelling State shall respect the right to private and family life of the person being expelled.

2. It may not derogate from the right referred to in paragraph 1 of the present article except in such cases as may be provided for by law and shall strike a fair balance between the interests of the State and those of the person in question.

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[217] Application No. 2991/66, *Alam and Khan v. United Kingdom*, *Yearbook* No. 2 (1968), p. 789; application No. 8244/78, *Singh Uppal v. United Kingdom*, *Decisions and Reports* 17, p. 149, and *Decisions and Reports* 20, p. 29.

[218] *Berrehab v. Netherlands*, decision of 8 March 1985, report of 7 October 1986, Judgement of 21 June 1988, Series A, No. 138.

[219] Application No. 3110/67, *X. v. Federal Republic of Germany*, *Decisions and Reports* 27, pp. 77-91; application No. 8924/80, *X. v. Switzerland*, *Decisions and Reports* 24; application No. 7289/76, *X. v. Switzerland*, *Decisions and Reports* 9, p. 57.

[220] See, for example, C. Van Muyler, "Le droit au respect de la vie privée des étrangers", *Revue française de droit administratif*, July-August 2001, p. 797.

(v) Non-discrimination

148. Unlike the rules discussed above, non-discrimination "does not originate from the hard core of human rights".[221] Found in various spheres of international law, this "principle" has different constituent elements and modes of application depending on whether it is applied to relations between States, relations between States and private individuals or relations between private individuals. The relevant situation in expulsion cases concerns relations between States and private individuals. In the context of such relations, the principle of non-discrimination first appeared in peace treaties in the form of standards for the protection of minorities and of populations and territories under mandate. In this regard, the Permanent Court of International Justice stated, in its advisory opinion on *Settlers of German origin in Poland*, that "[t]here must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law".[222] The Court further clarified its position in its judgment in *Minority schools in Albania*, adding that "[e]quality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations".[223]

149. In the field of human rights and civil liberties, the non-discrimination rule appears as a corollary to the general principle of equality in law between individuals,[224] although the two concepts are different.[225] The non-discrimination rule has thus been established, in varying formulations, in a number of international human rights instruments. For example, article 7 of the Universal Declaration of Human Rights provides that "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination". Under article 2, paragraph 1, of the International Covenant on Civil and Political Rights, each State party to the Covenant "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Article 2, paragraph 1, of the Convention on the Rights of the Child is substantially similar, although paragraph 2 of that article provides that States parties "shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members". Under article 2 of the

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[221] Emmanuel Roucounas, "Facteurs privés et droit international public", *Recueil des cours (Collected Courses of the Hague Academy of International Law)*, 2002, vol. 299, p. 159.

[222] Permanent Court of International Justice, Series B, No. 6, advisory opinion of 10 September 1923, p. 24.

[223] Permanent Court of International Justice, Series A/B, Judgment of 6 April 1935, p. 19.

[224] See Ph. Vegléris, "Le principe d'égalité dans la Déclaration universelle et la Convention européenne des droits de l'homme", *Miscellanea W.J. Ganshof van der Meersch*, vol. I, Brussels, 1972, pp. 427 ff.; W. Mekean, *The Meaning of Discrimination Under International Law*, Oxford, 1983; E. Vierdag, *The Concept of Discrimination in International Law*, The Hague, 1973; and Roucounas (note 221 above), pp. 160-161.

[225] See D. McRae, "The Contribution of International Trade Law to the Development of International Law", *Recueil des cours (Collected Courses of the Hague Academy of International Law)*, 1996, vol. 260, p. 166; T. Opsahl, *Law and Equality. Selected Articles on Human Rights*, Oslo, 1996, pp. 171 ff.

Convention on the Elimination of All Forms of Discrimination against Women,[226] States parties "condemn discrimination against women in all its forms" and undertake to implement a variety of measures to prohibit, eliminate or punish such discrimination. The term "discrimination against women" is defined in article 1 of that Convention as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field". The other international legal instruments for the protection of specific categories of people against discrimination reflect the same spirit: they are intended to guard against actions or conduct that aim at or result in discrimination. Such instruments include the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief[227] and the International Convention on the Elimination of All Forms of Racial Discrimination.[228]

150. The non-discrimination rule also appears in the principal regional human rights instruments. These include the European Convention, whose article 14 expresses the idea without using the word; Protocol No. 12 to the European Convention, which was opened for signature on 4 November 2000, broadens the scope of application of article 14. The Charter of Fundamental Rights of the European Union, in a formulation that differs from those in the European Convention and Protocol No. 12, which establish the right to the enjoyment, without discrimination, of the rights and freedoms set forth in those instruments, immediately highlights the idea of prohibiting discrimination. The Charter's article 21, paragraph 1, provides that "[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited". It may be noted that, with respect to sexual orientation, the current state of the law of Western countries is far from reflecting the general situation.[229] Lastly, the African Charter on Human and Peoples' Rights takes an original approach to non-discrimination that seems to be based more on values than on legal considerations. Article 28 of that Charter provides that "[e]very individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance". Of all the provisions referred to above, this is the only one that clearly and positively indicates

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[226] Adopted and opened for signature, ratification and accession by the General Assembly by its resolution 34/180 of 18 December 1979; entered into force on 3 September 1981.

[227] Proclaimed by the General Assembly on 25 November 1981 (resolution 36/55); art. 2.

[228] Adopted by the General Assembly on 21 December 1965 (resolution 2106 (XX)) and entered into force on 4 January 1969; art. 2. On this Convention and the non-discrimination rule, see, in particular, E. Decaux (ed.), *Le droit face au racisme*, Paris, Pedone, 1999, and S. Fredman (ed.), *Discrimination and Human Rights. The Case of Racism*, 2001.

[229] There are numerous precedents in this regard in European and North American case law, particularly in the United States (see Samuel M. Silvers, "The Exclusion and Expulsion of Homosexual Aliens", *Columbia Human Rights Law Review*, vol. 15 (1983-1984), pp. 295-332). At the same time, many countries in Africa, the Arab world and Asia have retained their laws penalizing homosexuality, and such laws have even been introduced in some countries where homosexuality had not been penalized before, such as Burundi, which adopted a law on this subject in March 2009.

what conduct should be adopted in order to ensure non-discrimination. Accordingly, it is of interest in connection with the rights to be preserved in cases involving the expulsion of aliens.

151. The question is how the non-discrimination rule can be applied to expulsion cases, given the acceptance of the principle of non-expulsion of nationals. The possibility that the expulsion of an alien may be due to discrimination vis-à-vis nationals cannot be discounted. This is why article 7 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live prohibits "[i]ndividual or collective expulsion of [aliens lawfully in the territory of a State] on grounds of race, colour, religion, culture, descent or national or ethnic origin". But it seems quite evident that non-discrimination should also apply in such cases between the aliens being expelled. The idea is that in expulsion cases there should be no discrimination not only between aliens and nationals, but also between different categories of aliens, on grounds such as those of race, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (International Covenant on Civil and Political Rights, art. 2, para. 1), with the European Convention adding, as seen above, "membership of a national minority" (art. 14 of the Convention and art. 1, para. 1, of Protocol No. 12).

152. Thus, in *Mauritian women*, the United Nations Human Rights Committee considered that the expulsions concerned were illegal because legislation had given rise to discrimination on the ground of sex by protecting the wives of Mauritian men against expulsion while not affording such protection to the husbands of Mauritian women.[230] Non-discrimination between aliens with respect to expulsion may be considered to have a relevant legal basis in the different international instruments cited above, which establish this rule as one of the elements of protection afforded to the specific categories of people to which they refer.

153. The European Court of Human Rights, in its judgement of 28 May 1985 in *Abdulaziz, Cabales and Balkandali*,[231] echoed the Human Rights Committee's views on *Mauritian women*, cited above. The Court held unanimously that article 14 of the European Convention had been violated by reason of discrimination against each of the applicants on the ground of sex: unlike male immigrants settled in the United Kingdom, the applicants did not have the right, in the same situation, to obtain permission for their non-national spouses to enter or remain in the country for settlement. After noting that "the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe", the Court expressed the view that "very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention".[232] It went on to stress that article 14 "is concerned with the avoidance of discrimination in the enjoyment of the Convention rights in so far as the requirements of the Convention as to those rights can be complied with in different ways".[233] On the other hand, it considered that, in the case in question, the

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[230] Views adopted on 9 April 1981, communication No. R 9/35, reproduced in part in *Human Rights Law Journal*, vol. 2 (1981), p. 139, para. 9.2.

[231] European Court of Human Rights, *Abdulaziz, Cabales and Balkandali v. United Kingdom*, Judgement of 28 May 1985, Series A, No. 94; relevant parts of the judgement are recalled by Marc Bossuyt in his commentary on article 14 in Pettiti, Decaux and Imbert (note 41 above), pp. 482-483.

[232] Ibid., para. 78.

[233] Ibid., para. 82.

fact that the applicable rules affected "fewer white people than others" was not a sufficient reason to consider them as racist in character, since they "did not contain regulations differentiating between persons or groups on the ground of their race or ethnic origin".[234]

154. The developments described above indicate that:

- The non-discrimination rule is widely established in written human rights law and the very nature of those rights requires that they be applied without discrimination to the categories of people concerned;
- This rule is established, with respect to expulsion, by the jurisprudence of the bodies responsible for monitoring the implementation of human rights instruments, although such jurisprudence is still based on a very limited number of cases;
- The prohibition of discrimination with respect to human rights in general, and expulsion in particular, "does not exist independently"[235] in that it is meaningful only when it is observed in relation to a given right or freedom;
- The legal instruments and case law considered do not attempt to provide an exhaustive listing of the different factors that may serve as grounds for discrimination.

155. Here again, the relevant rule should be formulated not in terms of rights which all beneficiaries should enjoy without discrimination, but in terms of the State's obligation not to apply the rights in question in a discriminatory fashion.

156. In the light of the foregoing analyses and observations, the following draft article is proposed:

Draft article 14: Obligation not to discriminate

1. The State shall exercise its right of expulsion with regard to the persons concerned without discrimination of any kind, on grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Such non-discrimination shall also apply to the enjoyment, by a person being expelled, of the rights and freedoms provided for in international human rights law and in the legislation of the expelling State.

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[234] Ibid., para. 85.

[235] M. Bossuyt, in Pettiti, Decaux and Imbert (note 41 above), p. 478.